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192
No. 2722

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

WILLIAM HANLEY,

Appellant,

vs.

THE PACIFIC LIVE STOCK
COMPANY, a corporation,

Appellee.

TRANSCRIPT OF RECORD

On Appeal from the District Court of the United
States for the District of Oregon,
From the Decree entered August 3, 1915.

Filed

DEC 3 1915

F. D. Monckton,
Clerk

IN THE
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*In the United States Circuit Court of Appeals for the
Ninth Circuit.*

WILLIAM HANLEY,

Appellant,

vs.

PACIFIC LIVE STOCK COMPANY,

a corporation,

Appellee.

NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD:

Mr. C. E. S. WOOD,

MR. ERSKINE WOOD, and

MR. LIONEL R. WEBSTER,

Yeon Building, Portland, Oregon,
for the Appellant.

MR. WIRT MINOR,

Spalding Building, Portland, Oregon, and

MR. EDWARD F. TREADWELL,

No. 1323 Merchants Exchange Building,
San Francisco, California,
for the Appellee.

In the matter of the Contempt of William Hanley,
Henry Luig, George W. Young, Hull Hotchkiss,
Carey Thornburg, James Dalton, and Robert Hud-
speth and P. G. Smith.

CITATION ON APPEAL.

United States of America, District of Oregon—ss.

To Pacific Live Stock Company, a Corporation, and
Teal & Minor, and E. F. Treadwell, its attorneys,
Greeting:

Whereas, William Hanley has lately appealed to
the United States Circuit Court of Appeals for the
Ninth Circuit from a decree rendered August 3, 1915,
in the District Court of the United States for the Dis-
trict of Oregon, in your favor, and has given the security
required by law;

You are, therefore, hereby, cited and admonished to
be and appear before said United States Circuit Court
of Appeals for the Ninth Circuit, at San Francisco,
California, within thirty days from the date hereof, to
show cause, if any there be, why the said decree should
not be corrected, and speedy justice should not be done
to the parties in that behalf.

Given under my hand, at Portland, Oregon, in said District, this 20th day of August in the year of our Lord, one thousand, nine hundred and fifteen.

CHARLES E. WOLVERTON,
Judge.

Service admitted this 20th August, 1915.

WIRT MINOR,
of Solicitors for Complainant.

Filed August 21, 1915. G. H. Marsh, Clerk.

*In the District Court of the United States for the
District of Oregon.*

Be it remembered, that on the 3rd day of October, 1899, there was duly filed in the Circuit Court of the United States for the District of Oregon, a Bill of Complaint, and on Tuesday, 10th day of December, 1901, the same being the 55th Judicial day of the regular October Term of said Court; present the Honorable Charles B. Bellinger, United States District Judge, presiding, there was entered a Final Decree; and that on the 5th day of November, 1915, there was filed a Stipulation that said Bill of Complaint and Final Decree as printed in cause No. 2036 in the Circuit Court of Appeals for the Ninth Circuit may be used and considered in this appeal the same as if the said Complaint and Decree were printed in this record, which said stipulation is in words and figures as follows, to wit:

STIPULATION.

No. 2577.

*In the District Court of the United States for the
District of Oregon.*

PACIFIC LIVE STOCK COMPANY,

a Corporation,

Complainant,

· vs.

W. D. HANLEY ET AL.,

Defendants,

and

HARRISON KELLY,

Intervenor.

In the matter of the contempt of William Hanley, Henry Luig, George W. Young, Hull Hotchkiss, Carey Thornburg, James Dalton, Robert Hudspeth and P. G. Smith.

Stipulated that the complaint and final decree in the above entitled cause, as printed in cause No. 2036 in the Circuit Court of Appeals, for the Ninth Circuit, and on file in the office of the Clerk of said Court, may be used and considered in this appeal of William Hanley from the decree adjudging him in contempt the same as

if said complaint and final decree were printed as a part of the record in this present appeal.

Dated October 5, 1915.

EDWARD F. TREADWELL,
Solicitor for Pacific Live Stock Company.

ERSKINE WOOD,
of Solicitors for William Hanley.

Filed November 5, 1915. G. H. Marsh, Clerk.

And, to wit, on the 26th day of February, 1900, there was duly filed in said Court, and cause and answer, the affirmative part of said answer being in words and figures as follows, to wit:

ANSWER.

*In the Circuit Court of the United States for the
District of Oregon.*

PACIFIC LIVE STOCK COMPANY,

a Corporation,

Complainant,

vs.

W. D. HANLEY AND OTHERS,

Defendants.

* * * * *

And this defendant further alleges that he is the owner and in the possession, use and occupancy of the

following described land in Harney county, Oregon: in township 23 south, range 31 east, Willamette meridian, all of sections 21 and 27, all of section 22 except the S $\frac{1}{2}$ of the SW $\frac{1}{4}$ and also the W $\frac{1}{2}$ of section 26, and that he is now, and at the beginning of this suit he was, in the possession, use and occupancy under lease from the owners thereof, of section 35, said township and range, and that under and by said lease he has the exclusive right to the possession, use and occupancy of the said lands for the period of more than two years from this time, and that he is now and was at the beginning of this suit in the exclusive possession, use and occupancy with the consent of the owner thereof, of sections 23 and 25, township and range aforesaid. That all of said lands lie upon and adjacent to the East fork of Silvies river, as the same is mentioned and described in the complainant's bill of complaint herein; a part of said land lying upon and adjacent to the East bank of said East fork of Silvies river aforesaid, and a part lying upon the west bank thereof. That all of said land is practically level, sloping slightly and gradually to the south and southeast, that the soil thereof will not produce anything without the use of a large quantity of water thereon for the irrigation thereof, but that with a sufficient quantity of water properly distributed over said land during the irrigating season, said land and the whole thereof will and does produce large and valuable crops of grasses each and every year and furnishes a large area of valuable pasturage. That from time immemorial, Silvies river, which rises and flows substantially as alleged in complainant's bill of complaint,

has been and still is a perennial stream, and each year the greater part of the waters thereof run down through said East fork thereof, to and upon the lands hereinbefore described and in the natural condition of the said water and said land, said water has each year covered almost all of said land during the irrigating season. That a large part of the said land in the natural condition of the same in relation to the said water, was submerged with said water each year to such a depth and for so long time as that no grass whatever grew or would grow thereon, and the same produced nothing but tule and flag and was of little or no value, and a small part of said land so lying upon and adjacent to said fork of said river as aforesaid was not ordinarily covered by the waters thereof. That in the year 1886, the defendant's predecessors in interest in said lands, for the purpose of distributing the waters of said branch of said river over and upon the lands not naturally overflowed thereby and of thus irrigating the same and of producing thereon large and valuable crops of the natural grasses thereof, and for the further purpose of preventing said water from flooding other parts of said land, thereby reclaiming the same so that it also would produce large crops of said grasses, placed a dam in said East fork of Silvies river in the NW $\frac{1}{4}$ of section 21 of the land above described and immediately thereafter dug and constructed a ditch leading out of said East fork of said river just above said dam and running around through said section 21, through and upon sections 22, 27 and the W $\frac{1}{2}$ of section 26 of the land above described, and diverted through said ditch under

six-inch pressure at least 1,000 inches of said waters, and in connection with said ditch and as a part of the plan for controlling and utilizing said water, and of controlling and utilizing the surface water which flows across said land when the water is high, they at the same time constructed a levee along that side of said ditch next to said fork of said river. That the said dam is the same mentioned in complainant's bill of complaint as being maintained by this defendant, and said ditch is one of the ditches therein designated as being maintained by him. That said dam is feet wide and feet high and said ditch is feet deep, feet wide on the top and feet wide on the bottom, and said ditch is built upon a grade of about 1/10 of an inch to the rod. Both said dam and said ditch have remained substantially as originally constructed, so far as affects the quantity of water taken from said fork of said river, and the method by which it is taken, ever since the same was originally constructed as aforesaid. Said dam was located and built, said ditch laid out and constructed, and said appropriation of water made under and pursuant to the local laws, rules, customs and regulations respecting the appropriation of water. That all of the water appropriated by and carried in said ditch which is taken from said East fork of said river as aforesaid, is necessary for the proper irrigation of the land covered by the said ditch, and this defendant and his predecessors in interest have so used said water to the extent and in the quantity aforesaid through said ditch upon said land for the irrigation thereof during the irrigating season of each and every year since the construction thereof and

the appropriation of the said water aforesaid which said use of said water has been at all times open, notorious, under claim and assertion of ownership and right and adverse to the complainant, its predecessors in interest and to all the world.

And this defendant alleges that the complainant and its predecessors in interest have known of the use of said water by this defendant and his predecessors in interest as aforesaid, and up to the time of the beginning of this suit no objection had ever been made thereto by said complainant, or its predecessors in interest. That although said dam and said ditch are now in purpose and effect the same as originally constructed as aforesaid, yet in order to maintain the same, it has been necessary, from time to time, to repair both said dam and said ditch, and in the year 1887 this defendant put in a new dam and repaired and cleaned out said ditch and expended a large sum of money.

That in the year 1896, the complainant entered into an agreement with this defendant and his predecessors in interest, that if they would extend said ditch until it reached the land of the complainant, namely, the SE $\frac{1}{4}$ of section 26, township 23 south, range 31 east, that it would assist in the construction thereof to said land, so that from thereon it would be enabled to continue said ditch onto and across its own land and for its own benefit and advantage. That pursuant to said agreement, this defendant and his predecessors in interest with the assistance of the complainant, extended said ditch down to the west line of said SE $\frac{1}{4}$ of section 26, and there-

upon said complainant continued the same onto and across said land and other of its lands. That the extension of said ditch, onto and across the complainant's said lands as aforesaid, effected the drainage and reclamation of a large tract of its land which had theretofore been too wet to produce crops and enabled it to irrigate other large tracts of its land, which without said irrigation was non-productive, whereby large tracts of its said land which otherwise would not and did not produce anything were made to and still do produce each year large and valuable crops of natural grasses. That ever since the extension of said ditch as aforesaid, the complainant has so used the same jointly with this defendant as aforesaid, and still so maintains and uses the same to its great and continued profit and advantage as aforesaid.

And this defendant further alleges that in the year 1897 he took out a small ditch above said dam on the west side of said East fork of Silvies river and extended the same down and parallel with the said river for a short distance onto section 27 aforesaid. Said ditch is feet deep, feet wide on the bottom and feet wide on the top, is constructed upon a grade of about 1/10 of an inch to the rod and the water conveyed therein is used for the purpose of irrigating land lying upon and adjacent to the west bank of the East fork of Silvies river.

And this defendant further alleges that in the year 1895, he constructed a ditch leading out of said East fork of Silvies river, on the east side thereof in the N¹/₂

of section 27 above described and about one and one-half miles below the dam above mentioned, and extended the same in a southeasterly direction until it enters into and upon the lands of the complainant on or near the SW $\frac{1}{4}$ of the SE $\frac{1}{4}$ of section 26, township 23 south, range 31 east. That said ditch is feet deep, feet wide on top, and feet wide on the bottom and is constructed upon a grade of about $\frac{1}{10}$ of an inch to the rod, and that the same was built to be used and is used by this defendant solely for the purpose of draining water from certain of his land as above described and was not intended to be used and never has been used by him for the purpose of irrigation. That there is no dam in connection with said ditch and that by draining the water off from his land through said ditch, he prevents a large tract thereof from being so submerged with water as to render it valueless, and that thereby he is enabled to and does reclaim a large body of his land, so that the same can and does produce abundant and valuable crops of wild grasses every year, which is used for hay and pasturage by this defendant. And this defendant alleges that said ditch was constructed by him with the knowledge, consent, and acquiescence and solicitation of the complainant; and that with the knowledge, assent, and acquiescence of said complainant, he expended large sums of money in the construction thereof. That not only does the said ditch accomplish the reclamation of a large amount of land for this defendant, as aforesaid, but in the same manner, by the same means, and with the like effect, it also reclaims a large amount of land belonging to said complainant. That not only did said

complainant know of, assent to and acquiesce in the construction of said ditch by this defendant as aforesaid, but encouraged and assisted him in the construction thereof; that said complainant requested him to construct said ditch down to and upon its land, namely, the SE $\frac{1}{4}$ of section 26 as aforesaid, and proposed and agreed with him that if he would do so, it would continue the construction thereof onto and through its lands, giving the water thereby to be conveyed an outlet and enabling it to use the same for the irrigation of certain of its lands not otherwise subject to irrigation, and thereby gaining to itself not only the advantage of drainage as aforesaid, but of irrigation also. That pursuant to such proposal and agreement, and relying thereon, this defendant, at great trouble and large expense to himself as aforesaid, did construct said ditch as aforesaid, down to and upon the lands of said complainant as aforesaid, and said complainant complied with and carried out its said proposal and agreement and continued said ditch down to, upon and across its said land as it had proposed and agreed to do as aforesaid, and ever since has used and still uses said ditch in conjunction with this defendant as aforesaid and has been and still is greatly benefitted thereby.

And this defendant alleges that he uses all of the land so owned and occupied by him as aforesaid each year for the raising of the natural grasses thereon, a part of which is annually cut and cured for hay and the remainder thereof is used for the pasturing of cattle and other live stock. That by the use of the water thereon for irrigation as aforesaid and by the removal of surplus

water therefrom as hereinbefore alleged, he is enabled to produce and does produce large and valuable crops thereon each year as aforesaid. That the irrigating season for said lands extends from the first day of April to the first day of July of each year and that during such time he needs for the irrigation of said lands two thousand five hundred inches of water flowing under a six-inch pressure. That during the irrigating season, as aforesaid, that amount of water has been used for the purpose of raising, caring for, breeding and fattening cattle, and large herds thereof have annually been so raised, cared for, fed and fattened on said land with the hay and pasturage raised and produced thereon, as aforesaid, and this defendant now uses said land and the hay and pasturage raised thereon in the same manner and for the same purpose, and in addition thereto he sells large quantities of the hay produced thereon and by these means he is enabled to and does realize each year a large annual income therefrom. That by the use of the waters of the East fork of Silvies river upon said land in the manner and to the extent hereinbefore and shown, said land is of great value and produces for him a large income as aforesaid, but without the use of said water as aforesaid said land will be of little or no value and no income could be realized therefrom.

And this defendant further alleges that the use of said water by him in the manner and to the extent aforesaid does not deprive complainant of any water which it would otherwise receive nor does it in the least hinder or embarrass it in the use thereof, but on the contrary, more water is sent down upon its land where water is

needed, and a large tract of land which is too wet is drained and put in condition to produce valuable crops as aforesaid, and if said dam was removed and said ditches destroyed, the complainant would be injured instead of benefited thereby. All of which matters and things, this defendant is ready and willing to maintain and prove, as this honorable court shall direct; and he prays to be hence dismissed with his reasonable costs and charges, in this behalf sustained and incurred.

LIONEL R. WEBSTER,
BIGGS & TURNER,
Solicitors for Defendant.

State of Oregon, Multnomah County—ss.

Due and legal service of the foregoing answer is hereby accepted, and receipt of certified copy thereof admitted at Portland, Oregon, February 26, 1900.

L. B. COX,
Solicitor for Complainant.

U. S. Circuit Court, District of Oregon, filed Feb. 26,
1900. J. A. Sladen, Clerk.

And afterwards, to wit, on the 29th day of April, 1915, there was duly filed in said Court, and cause an affidavit of John Gilcrest in words and figures, as follows, to wit;

AFFIDAVIT OF JOHN GILCREST.

*In the Circuit Court of the United States for the
District of Oregon.*

PACIFIC LIVE STOCK COMPANY (a corporation),
Complainant,

vs.

W. D. HANLEY, F. L. MACE, H. C. LEVENS, GEORGE
WHITING, THOMAS WHITING, IONE WHITING, JOHN
C. FOLEY, N. BROWN, J. H. BYERLY, C. P. RUTH-
ERFORD, C. A. SWEET, M. CUSHING, D. M. McMEN-
AMY, JOHN I. NEWMAN, CHARLES NELSON, W. H.
MARRS, MANNA MARRS, JOSEPH T. BARNES, WIL-
LIAM CLARK, C. H. VOEGTLY, GEORGE W. YOUNG,
MRS. A. E. YOUNG, P. G. SMITH, GREEN HUDSPETH,
JAMES DALTON, HULL HOTCHKISS, CASPAR LUIG,
MRS. F. E. MCGEE, PETER CLEMENS, B. R. PORTER,
and THE HARNEY VALLEY DAM, DITCH AND IRRIGATING
COMPANY, (a corporation),

Defendants.

and

HARRISON KELLEY,

Intervenor.

NUMBER 2577.

In the matter of the contempt of William Hanley,
Henry Luig, George W. Young, Hull Hotchkiss,
Carey Thornburg, James Dalton and Robert Hud-
speth and P. G. Smith.

State of Oregon,

County of Harney—ss.

John Gilcrest, being first duly sworn, deposes and says that he is superintendent of the Pacific Live Stock Company, complainant in the above entitled suit, and has been such at all times herein mentioned;

That on the tenth day of December, 1901, this Court duly gave, made and entered its final decree in the above entitled suit, which final decree has never been appealed from, modified, vacated or set aside, and is still in full force and effect, and all of the defendants in the said suit and all of the persons above mentioned have at all times had notice and knowledge of the said decree and of all of the terms and provisions thereof;

That by the terms of the said decree all of the defendants in said suit, their servants, agents and attorneys, and all persons claiming by, through or under them, were, and each of them was enjoined and restrained from interfering with, obstructing or diverting any of the waters of Silvies River or the East or West fork thereof except in the manner and at the times expressly permitted and provided for in and by the said decree, and were enjoined and required to remove all dams and obstructions in the said stream, except such dams and obstructions as were expressly provided for in and by the said decree; that since the entry of said decree Carey Thornburg succeeded to the land and water rights owned by C. H. Voegtly at the time of said decree;

That since the entry of the said decree, the defendant Caspar Luig died and Henry Luig has succeeded

to all of the land owned by him at the time of the said decree, and has been in possession of the same and of the Luig Dam mentioned in the said decree, and has at all times had knowledge and notice of the said decree and of the terms thereof;

That since the entry of the said decree, the defendant Green Hudspeth died and Robert Hudspeth, as one of the heirs of the said Green Hudspeth, has been in the possession of the said property of Green Hudspeth and the works used for the irrigation thereof, and has had knowledge of all of the terms of the said decree;

That the general purpose of the said decree was to permit the flood water of Silvies River, which generally occurs during the months of March and April, to flow unobstructed through the said river to the lands of Complainant until on or about the 12th day of May each year, after which time the defendants in said action were to have the use of the said water in the manner provided by the terms of said decree;

That generally the flood water of the said river during the said months, is as high as 1200 to 1500 cu. ft. per second, but in the year 1915, owing to the light fall of snow, the flow of said river during said months, has been exceedingly low, and the water thereof has scarcely been out of the natural banks of the said river except when artificially diverted, and the flow of the said river during the said months has been between 300 and 600 feet per second;

That the snow in the mountains has been largely melted and the entire prospect is that there will be no

high flow of the water of the Silvies River during the said year 1915, all of which is known by the parties above named and generally in the said community; and unless the said complainant receives water during the period before the 12th day of May, 1915, it will receive little, if any, water from said river during said year;

That for the purpose of depriving said complainant of the said water to which it is entitled by the terms of said decree, the said defendants and parties above mentioned, to wit, William Hanley, Henry Luig, George W. Young, Hull Hotchkiss, James Dalton and Carey Thornburg, in violation of the terms of the said decree, have conspired together to take the water of the said river and have during the months of March and April, 1915, totally disregarded the terms of the said decree and obstructed the said water and the channel of the said river and the East and West forks thereof, and have taken and diverted the water of the said river above the lands of complainant so as to prevent the same from flowing to the lands of the complainant, and during the said period and while the average flow of the said river was about 450 cu. ft. per second, the said defendants have diverted far in excess of 300 cu. ft. per second of the waters of the said river, and in this behalf the said affiant shows;

I.

That in and by the terms of the said decree the defendant Luig was permitted to maintain one dam in Silvies River in Sec. 31, Twp. 23 S., Range 31 E, from

the 15th day of May until the first day of July of each year and not otherwise, and was required to remove all of the boards from said dam during the balance of said year; That notwithstanding the said decree and in violation and contempt thereof, the said Henry Luig, in the month of April, 1915, completely closed the said dam by putting the boards therein and by means thereof obstructed the water in the West fork of Silvies River and backed the same up the channel of the said river and by means thereof diverted in excess of 40 cu. ft. of water of the said river and being all of the water of the said West fork flowing at said dam except about 4 second feet; and that the said defendant William Hanley encouraged, advised and assisted said Henry Luig in the acts aforesaid and in the contempt and violation of the said decree as aforesaid;

II.

That by the terms of the said decree the defendant George W. Young and the defendants Hull Hotchkiss and C. H. Voegtly were permitted to maintain one dam in the West fork of Silvies River, which was then situated in the NE $\frac{1}{4}$ of Sec. 30, Twp. 23 S., Range 31 E., about a quarter of a mile south of the north line of the said Section 30, together with the ditches connected therewith, and were permitted to close and use the said dam from the 12th day of May to the first day of July of each year, and at no other times, and were enjoined and restrained from maintaining any other dam in the said river; That notwithstanding the premises, several years ago the said dam was washed out and thereupon

the said defendant George W. Young and the said Hull Hotchkiss and the said Carey Thornburg, in violation and contempt of the terms of the said decree, constructed a new dam about a quarter of a mile up stream from the location of the said dam permitted by said decree, and constructed the same with a permanent board across the floor thereof, which raised the water in said stream at all times about a foot and a quarter, and have ever since maintained the said dam and have also constructed a new ditch taken out of the said river above the said dam and leading onto the lands of the said Young, Hotchkiss and Thornburg, and during the month of April, 1915, the said defendants, by means of the said dam and ditch, diverted water into the same for a long period of time, in excess of 2 cu. ft. per second and carried the same away from the said river and to the said lands; That at the time aforesaid the water in the said river would not naturally flow into the head of the old ditch on said property, but the bottom of the said old ditch was almost two feet above the water naturally flowing in the said river when unobstructed by said new dam, and all of the said water was diverted by reason of the said new dam and in violation of the terms and provisions of the said decree, and the said water has been permitted by the said defendants to flow down a large ditch 12 feet in width, on two sides of the County Road, and there to stand and seep into and upon their lands and to flow over the same, and in all the acts aforesaid the said defendants have been acting under the advice and encouragement and with the assistance of the said defendant William Hanley;

That heretofore this honorable Court adjudged that the said defendant George W. Young had violated the terms of the said decree by constructing the dam aforesaid, but was permitted by this honorable Court to purge himself of contempt by paying the costs of said contempt proceedings and by removing the said dam, but the said defendant, Young, has not purged himself of said contempt and has not paid the costs of said proceedings, or removed the said dam, but in continued violation of the said decree and in willful contempt thereof has continued to maintain the said dam and ditches aforesaid;

III.

That long prior to the entry of said decree, there was a dam belonging to the defendant Hull Hotchkiss and C. H. Voegtly situated near the south line of the said Sec. 30, but for a considerable time prior to the entry of the said decree, the said parties had not used the said dam, but had used the dam mentioned by the said decree as the Young dam situated in the NE $\frac{1}{4}$ of said Sec. 30, and by the terms of the said decree, the defendants Hotchkiss and Voegtly were enjoined and restrained from using the said Voegtly dam, near the south line of Sec. 30, but were permitted to maintain and use the said Young dam, on the NE $\frac{1}{4}$ of Sec. 30; that since the entry of the said decree, the skeleton of the said Voegtly dam has remained in the said river, but has never been used and has not materially obstructed the said river during the irrigating season, until the year 1914, at which time the said Carey Thornburg and Hull Hotchkiss placed some hay and manure in the said dam, which was torn out by this affiant; That notwithstand-

ing the terms of the said decree and in willful violation thereof, the said Hull Hotchkiss and Carey Thornburg, in the year 1915 and particularly in the month of April, placed a large amount of timbers, boards and other material in the skeleton of said Voegtly dam, and by means thereof have obstructed and raised the water in the West fork of the said river in its flow to complainant, and have ever since and still are maintaining the boards in the said dam, and in doing so are assisted, advised and encouraged by the said defendant, William Hanley, all in willful contempt and violation of the terms of the said decree;

IV.

That notwithstanding the terms of the decree and the facts aforesaid, in the fall of 1914 and in the spring of 1915, the said defendants P. G. Smith and the said Carey Thornburg constructed a new wooden and rock dam in the said West fork of Silvies river, immediately above the said Voegtly dam, and extending clear across the said river; That the said old Voegtly dam was 28 feet in width, extending clear across the channel of the said river, and was constructed of wood with openings totaling $23\frac{1}{2}$ feet in the clear; That the said new dam is constructed of wood of a total width of only 16.4 feet across said stream and with openings totaling only 12.3 feet in the clear; That the balance of the said dam across the said stream and being about 12 feet in width, consists of a solid rock dam acting as a permanent obstruction to the free flow of the water of said river and the floor of the said new dam is 1.2 feet higher than the floor of the

old dam, and at the present time the said new dam and old dam are raising the water of said river in excess of one foot in the channel thereof, and the said defendants have threatened to continue to maintain the said dam and to put further boards and obstructions therein, and in all the acts aforesaid, the said P. G. Smith and Carey Thornburg have been acting with the assistance, advice and encouragement of the said William Hanley and in willful contempt and violation of the terms of the said decree;

V.

That in and by the terms of the said decree, the said defendant William Hanley was enjoined and restrained from using a certain ditch except for the purpose of draining water from the surface of his land; That during the months of March and April, 1915, it was unnecessary to drain water from the said land of the defendant William Hanley, but on the contrary, the same was the irrigation season during which the said defendant William Hanley was attempting to put water on the said land for the irrigation thereof, and notwithstanding the terms of the decree, and in willful contempt and violation thereof the said defendant, during a long period in the months of March and April, had the head of the said drain ditch open, and by means thereof was diverting from the East Fork of Silvies river in excess of 30 sec. ft. of water of the said river and using the same for the irrigation of his land;

That in and by the terms of said decree, the said William Hanley was permitted to maintain a certain

dam known as the 21 dam, but was enjoined from obstructing the water of said river by means thereof prior to the 5th day of May of each year, but notwithstanding the premises, and during the year 1915, during the months of March and April thereof, the said defendant William Hanley placed and maintained one board part way across the said dam and permitted and suffered a large amount of brush and debris to gather above the said dam, which raised the water of the said river at least one foot higher than the floor of the said dam, and by means thereof diverted into the said Hanley upper ditch, referred to in said decree, in excess of 40 cu. ft. per second, all in willful contempt and violation of the terms of said decree;

That in and by the terms of the said decree, the said William Hanley was enjoined and restrained from in any manner obstructing the channel of Silvies river prior to the 5th day of May each year, and was also enjoined and restrained from diverting any water therefrom except as would naturally flow through the Upper Hanley ditch, but notwithstanding the premises, and during the months of March and April, 1915, the said defendant William Hanley, in willful contempt and violation of the said decree, made the following diversions by means of cuts in the banks of the said river on his land described in said decree, to-wit, In the left bank of the East fork of Silvies river about 900 feet below the Hanley drain ditch, a cut in the bank of said river about 12 feet in width and 3 feet in depth, diverting about 50 sec. ft. of water from said river; a cut in the left bank of said river about 1000 feet above the south

line of Sec. 27, Twp. 23 S., Range 31 E., diverting about 6 sec. ft. of water of said river; besides the foregoing, the said defendant Hanley diverted a large quantity of water through numerous smaller cuts in said river through said Sec. 27 and aided the diversion of water through the same as well as the cuts aforementioned, in the following manner: The said channel of Silvies river through the said Sec. 27 and through Sec. 35, in the said Twp., is small and sluggish and easily obstructed, and the said defendant Hanley, in willful violation and contempt of the terms of the said decree, has, during the months of March and April, 1915, further obstructed the channel of said river by maintaining therein on Sec. 27, the timbers of an old bridge which has been destroyed, across the said river, and which timbers have been permitted to fall and lodge in the said river, and also by maintaining another bridge over the said river, the stringers of which are set into and below the banks of said river and so that the same obstructs the flow of water of the said river and the said defendant also permits to accumulate in the channel of said river and to be caught by said bridges, and timbers, the carcasses of dead cattle and hogs and also other material which has obstructed the channel of the said river and prevented the water thereof from flowing down the same and which assisted it to flow over the banks and out of the low places along the banks of said river and also through the cuts in the banks aforesaid; and by means thereof, the said defendant has diverted about 75 sec. ft. of water from the said river on the West side in addition to the water aforesaid, and all of said acts of the said defendant

have been in willful violation of the terms of the said decree;

VI.

That in and by the terms of the said decree, the defendants Green Hudspeth, James Dalton and the intervenor, Harrison Kelly, were permitted to maintain a dam and ditch generally referred to as the People's ditch and dam, in Sec. 31, Twp. 23 S., Range 31 E., and were permitted to divert a certain amount of water by means thereof for irrigation from the 12th day of May until the first day of July of each year, and not otherwise; That notwithstanding the premises, during the month of April, 1915, the said Robert Hudspeth and the said James Dalton, in contempt and violation of the said decree, permitted and suffered the said head-gate in the said ditch to be and remain open and by means thereof have diverted between 4 and 5 sec. ft. of water of the said river and carried the same through the said ditch and away from the West fork of the said river, all of which is done in willful contempt and violation of the terms of said decree.

Wherefore, the said Complainant asks that an order to show cause be issued, and that the said defendants be dealt with in such manner as may be meet in the premises.

JOHN GILCREST.

Subscribed and sworn to before me this 26th day of April, 1915.

R. T. Hughet, Clerk.

(Seal.)

By Walter G. Struck, Deputy.

Filed April 29, 1915.

G. H. Marsh, Clerk.

And afterwards, to wit, on Tuesday, the 29th day of April, 1915, the same being the 53rd Judicial day of the regular March, 1915, term of said Court; present: the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

ORDER TO SHOW CAUSE.

*In the District Court of the United States for the
District of Oregon.*

No. 2577

PACIFIC LIVE STOCK COMPANY (a corporation),
Complainant,

W. D. HANLEY, F. L. MACE, H. C. LEVENS, GEORGE
WHITING, THOMAS WHITING, IONE WHITING, JOHN
C. FOLEY, N. BROWN, J. H. BYERLY, C. P. RUTH-
ERFORD, C. A. SWEET, M. CUSHING, D. M. McMEN-
AMY, JOHN I. NEWMAN, CHARLES NELSON, W. H.
MARRS, MANNA MARRS, JOSEPH T. BARNES, WIL-
LIAM CLARK, C. H. VOEGTLY, GEORGE W. YOUNG,
MRS. A. E. YOUNG, P. G. SMITH, GREEN HUDSPETH,
JAMES DALTON, HULL HOTCHKISS, CASPAR LUIG,
MRS. F. E. MCGEE, PETER CLEMENS, B. R. PORTER,
and THE HARNEY VALLEY DAM, DITCH AND IRRIGATING COMPANY, (a corporation),

Defendants.

and
HARRISON KELLEY,

Intervenor.

In the matter of the contempt of William Hanley, Henry Luig, George W. Young, Hull Hotchkiss, Carey Thornburg, James Dalton and Robert Hudspeth and P. G. Smith.

ORDER TO SHOW CAUSE.

Upon reading the affidavit of John Gilcrest in the above entitled cause and good cause appearing therefor, it is hereby ordered that William Hanley, Henry Luig, George W. Young, Hull Hotchkiss, Carey Thornburg, James Dalton, Robert Hudspeth and P. G. Smith be and appear before this court in the court room thereof in the city of Portland, State of Oregon, on the 7th day of May, 1915, at the hour of ten o'clock A. M. and then and there show cause, if any they have, why they and each of them should not be punished for contempt of said court for violation of the provisions of the final decree made and entered in said cause on the 10th day of December, 1901; and it is further

Ordered that this order to show cause may be served by William Austin Goodman, Sheriff of Harney County, or his deputy.

Dated this 29th day of April, 1915.

CHAS. E. WOLVERTON,
District Judge.

RETURN ON SERVICE OF WRIT.

United States of America, District of Oregon—ss.

I hereby certify and return that I served the annexed order to show cause on the therein named W. D. Hanley, by handing to and leaving a true and correct copy thereof, together with the copy of the affidavit, with him personally at Portland, in said District, on the 29th day of April, A. D. 1915.

JOHN MONTAG,

U. S. Marshal.

By **LEONARD BECKER,**

Deputy.

Filed April 29, 1915.

G. H. Marsh, Clerk.

And afterwards, to wit, on the 6th day of May, 1915, there was duly filed in said Court and cause a motion and affidavit of William Hanley in words and figures as follows, to wit:

**MOTION AND AFFIDAVIT OF WILLIAM
HANLEY.**

*In the District Court of the United States for the
District of Oregon.*

In the Cause entitled:

*In the Circuit Court of the United States for the
District of Oregon.*

PACIFIC LIVE STOCK COMPANY,

a Corporation,

Complainant,

vs.

W. D. HANLEY, F. L. MACE, H. C. LEVENS,

ET AL.,

Defendants,

and

HARRISON KELLEY,

Intervenor.

Number 2577.

In the matter of the contempt of William Hanley, Henry Luig, George W. Young, Hull Hotchkiss, Carey Thornburg, James Dalton and Robert Hudspeth and P. G. Smith.

Now comes William Hanley, by C. E. S. Wood and Erskine Wood, of Wood, Montague & Hunt, and Lionel R. Webster, of Emmons & Webster, and moves the court for an order discharging the rule to show cause why he should not be punished for contempt; and in support of said motion refers to the affidavit of said William Hanley as follows:

United States of America, District of Oregon—ss.

I, William Hanley, first being duly sworn according to law, say that I am the same W. D. Hanley, a party defendant in the above entitled cause.

I have been advised by counsel learned in the law that the decree entered in the above entitled cause and referred to in the affidavit of John Gilcrest in this proceeding applies only to the parties defendant in the said original suit, or their privies or successors in interest, and only to those lands described in the complaint and in said decree, and that said decree has no application to lands which were not described in said complaint and decree and the water-rights to which were considered in said suit.

The flow in the river for the spring of 1915 was not so high as usual, but I am not prepared to state what is the general average flow; the United States Government has been making observations for the purpose of determining this fact, but my understanding is they have not continued sufficiently long to determine any conclusion. It is not true that the water of the river has not been out of its natural banks during this season except when artificially diverted. I cannot say whether the flow of the river has been between 300 and 600 cubic feet per second. I cannot say whether the snow in the mountains has already been largely melted, but I believe the flow of Silvies river during this year will not be as abundant and the river will not be as high as usual, but if the complainant does not receive sufficient water for its purpose either before or after the twelfth of May, it will be by reason of its own acts combined with the natural shortage at this season.

I deny that I have conspired with Henry Luig, George W. Young, Hull Hotchkiss, James Dalton and

Carey Thornburg, or any or either of them, to take the water of said river, or in any way to violate the terms of said decree. I deny that I have directly or indirectly disregarded the terms of said decree or obstructed the water in the channel of said river or diverted the water or the river above the lands of the complainant so as to prevent the same from flowing to the lands of the complainant, and deny that I have directly or indirectly, while the flow of the river was only about 450 cubic feet per second, diverted far in excess, or at all in excess, of 300 cubic feet per second of the waters of said river, and deny that I have directly or indirectly diverted any water which I was not entitled to divert under the terms of said decree. As will be more particularly shown hereafter, there has been absolutely no diversion by me, or under my advice or encouragement, from the waters of said river except the natural overflow as it has always been accustomed to flow during the high water of each season. To the best of my recollection, I have only seen Henry Luig in a cattle deal and have never spoken to him concerning the question of the diversion of water, or upon any matter relating to the dams or the decree or the matters referred to in the affidavit of the said Gilcrest. Section 31 is in the care of Carey Thornburg under contract and I have spoken to him briefly in this connection as will hereafter more particularly appear. If I have seen the remaining defendants, Geo. W. Young, Hull Hotchkiss, James Dalton, Robert Hudspeth and P. G. Smith, it has been only the casual meeting of neighbors and no word whatever has passed between us relating to the waters of Silvies river or the use of dams,

or the decree, or any of the matters referred to in the affidavit of said Gilcrest. I have been exceedingly busy this spring in turning out cattle and also in selecting and marketing cattle upon contracts and in attending to the affairs of large ranches which are thirty and seventy miles from each other; I have been absent from Harney Valley much of the time and as yet have given no orders for the actual diversion or appropriation of water, but only such orders of preparation for the irrigating season commencing by the terms of said decree on the 5th of May and as will hereinafter particularly appear, except this: About the middle of March I consulted with one of my counsel, Mr. C. E. S. Wood, as to what could be done to remove all cause of complaint against me by the Pacific Live Stock Company and if possible to start the commencement of a neighborly feeling, and after such consultation I returned to Harney Valley and gave instructions which were carried out that the head of the drain-ditch was to be sealed water-tight, the dam in section 21 kept wide open and though I was advised there was no obligation on me to take the burden of correcting the natural banks of the river, nevertheless I ordered all gaps where water might waste to be stopped up in the banks of the river, which was done.

Answering the specific points made in the affidavit of the said Gilcrest, I say as follows:

I.

Answering paragraph I of the said affidavit, I say that so far as I am informed and believe Henry Luig did

not in the month of April, 1915, or at any other time, close the dam in section 31, referred to in that article, but the boards were put in said dam by my own order given to Carey Thornburg, which is the order just hereinbefore referred to by me. That I gave such order and used such dam upon the advice of counsel and for the following reasons: At the time of said decree and long prior thereto said dam was in existence in the same place where it now is. The said dam was originally constructed by Peter Stenger for the purpose of irrigating section 31 from the waters of Silvies river, which section Stenger at that time had under lease from Charles Altschul, forming a part of what is known as the old Wagon Road Land Grant, and neither Stenger as lessee of said section nor Altschul as the owner thereof were parties to this suit, nor to the decree in question. I succeeded to Stenger in the lease of said section in 1898, according to my present belief, but at any rate before the commencement of this suit and before the entry of this decree, and succeeded to Stenger's interest in said dam in section 31 for the purpose of irrigating said section 31, and as before stated I was not made a party to this suit as lessee of said section 31, nor was Charles Altschul, the owner in fee simple. On July 1, 1903, the said section 31 was sold by the said Charles Altschul, by mesne conveyances, to the William Hanley Company, and during every year hereinbefore mentioned, to-wit: from the time of the Peter Stenger lease long before this suit and this decree, the said dam has been used by the lessees or owners of section 31 for the irrigation thereof without the intermission of a single season until the present time.

That about the time I acquired the lease of section 31, and certainly long before the commencement of this suit or the entry of this decree, I constructed a new dam in the place of the old Stenger dam, which new dam is the dam here in question and which was referred to in the decree. Casper Luig, the predecessor in interest of Henry Luig, assisted in the construction of said new dam and was by me allowed, in consideration thereof, a joint interest in said dam for the purpose of watering his holdings in section 6, particularly described in the complaint and the decree, to-wit: The East $\frac{1}{2}$ of the SW $\frac{1}{4}$ and lots 6 and 7 and the SE $\frac{1}{4}$ of the NW $\frac{1}{4}$ and lots 3, 4 and 5, all of section 6, T. 24 S. R. 31 E.; and the said Luig also used said dam for the purpose of diverting water to irrigate other lands not mentioned in said decree and as I am informed and believe and so state and according to the best of my recollection such dam has so been used every year ever since said construction, prior to the decree, without intermission. I, therefore, state to the court under oath, as a purgation of the alleged complaint that in ordering the said Carey Thornburg to put the boards in said dam as charged in the first article of the complaining affidavit, I did what I had been doing continuously long prior to the decree and under the belief, as advised by counsel, that my right so to do and my right to continue so irrigating section 31 was a right of the William Hanley Company as successor in interest to Charles Altschul, the owner of section 31, and was in no wise affected by said decree.

II.

Answering paragraph II of the complaining affidavit, I say as before that I have never had any conversation with George Young, Hull Hotchkiss, C. H. Voegtly, or any of them, as to their management of the dam referred to in the affidavit, or diversion of water from Silvies river this year, and have neither directly nor indirectly encouraged them to any violation of the decree, or to any act whatever in the premises. That while I wish to be emphatic in the foregoing statement that I have neither directly or indirectly, nor by advice or encouragement, taken a drop of water from Silvies river this year by said Young dam, I wish to be entirely frank with the court and state that I consider myself the actual owner of said dam by purchase from Young, and I purchased said dam for the purpose of using it to divert water from the river to irrigate section 29, and section 29 stands in exactly the same category and relation as section 31 referred to in the preceding article, namely: it is a Charles Altschul or Wagon Road section, which was in no way involved in this suit or this decree, and has since this decree by mesne conveyances been acquired by the William Hanley Company. That until yesterday, the 29th day of April, 1915, when the complaining affidavit was served upon me in Portland, Oregon, I had no knowledge of the Geo. W. Young contempt proceedings, or that he had been ordered to remove said dam or purge himself of contempt by paying costs. I am advised by counsel that the said decree in the contempt proceedings against said Young does not specifically require said Young to remove said dam, but

only to refrain from obstructing the flow of the river except as permitted by the decree, and to pay costs. However, to make this point absolutely clear, I wish to repeat that though I purchased the Young dam in good faith and in entire ignorance of any decree against it or Young, I have not used it, nor incited anyone to use it, and did not know it had been used this year.

III.

Answering paragraph III of the complaining affidavit, I do not have any interest in the dam therein referred to and knew nothing whatever of the circumstances therein related. Though Carey Thornburg is hired by the William Hanley Company to look after section 31, as hereinbefore stated, yet he has lands in which he himself is interested which are served and irrigated by this dam, and though I know nothing whatever of the facts and circumstances, I would assume that Hotchkiss and Thornburg, if they did any of the acts alleged in said paragraph III, were acting for their own benefit.

IV.

Answering paragraph IV of the complaining affidavit, the words "Hull Hotchkiss" have been erased at the commencement of said paragraph and the name P. G. Smith inserted, but further on the name Hull Hotchkiss remains. I assume that this erasure indicates the name intended, namely, P. G. Smith, but whatever names be used or intended, I did not assist, advise or en-

courage the persons named in said paragraph IV, or any other persons, to said act or any other acts. In fact, I knew absolutely nothing about the facts complained of in paragraph IV until I read same here in Portland. I have never seen the dam referred to in said paragraph IV as the "new wooden and rock dam" and I do not know even by hearsay that any such dam is in existence. In fact, P. G. Smith owns the SE $\frac{1}{4}$ of section 30, Hull Hotchkiss owns the NW $\frac{1}{4}$ of said section 30 and Carey Thornburg owns the SW $\frac{1}{4}$ of said section 31 and George Young the NE $\frac{1}{4}$ of said section, and if Smith, Hotchkiss and Thornburg did anything at all in the premises, as to which I have no knowledge whatever, they were undoubtedly acting of and for themselves and of their own interest, and I emphatically state that I have never given assistance, advice or encouragement to them, or any one else in the premises.

V.

Answering paragraph V of the complaining affidavit, I will say that the drain-ditch referred to was positively not open during a long period in the months of March and April, or otherwise than as here and now stated: During the winter of 1914-15, and prior to the middle of March, 1915, the water in Silvies river froze very heavy and thick so as to constitute a dam or obstruction in Silvies river and when the flood-water commenced, the channel being thus obstructed, the water was excessively thrown out over the banks of the river for a considerable period of time. The William Hanley Company was feeding cattle on sections 27 and 35,

which are the same sections for the drainage of which said ditch is provided and the draining of which at all times when necessary is allowed by said decree. The hay with which said cattle were being fed was situated in large tracts on said sections 27 and 35 and in order to protect these feeding grounds from the overflow water, the said drain-ditch was opened and kept open for no other purpose than to drain said lands as it was allowed to do; but about the middle of March, after talking with counsel, C. E. S. Wood, in Portland, and for the purpose of early in the year eliminating any possible ground of complaint, the head of the said drain-ditch was closed by my order and tamped tight with manure and I have so seen it from time to time myself and it so remains at this present time. I emphatically deny that this drain-ditch has been, in March or April or at any time this year, used for the irrigation of any of my land or the William Hanley Company's land, or otherwise than as a drain-ditch as permitted by the decree.

Answering further paragraph V of the complaining affidavit, I deny that during the months of March or April, or at any other time during the year 1915, I placed or maintained, or caused to be placed or maintained one board part way across said dam, or permitted or suffered a large amount of brush and debris to gather above the said dam, or by any other device, contrivance or trick diverted into the said Hanley upper ditch any water whatever. I am necessarily absent from this locality, and indeed from any one particular locality of the many properties under my charge, a great deal on business of the company, and while I cannot admit it for I

do not know, I will say that it may be possible that for some short period one board may have been part way across the dam. If this was so, it was without design, without my instruction, and without my knowledge, and if so it could not have had any material effect on the stream. The said dam I would guess to be about 24 or 25 feet wide; it is practically the whole width of Silvies river, and the boards are of different widths; some six inches and some eight inches. I do not understand whether the affidavit is meant to say that brush and debris gathered in the river on the premises of the William Hanley Company above the dam, or whether the brush and debris gathered in the dam itself by reason of this board. But I will say whatever may be the facts and circumstances, it is not true that brush or debris were deliberately permitted to gather and remain in the river so as to act as an obstruction to the flow thereof, but all such accidental obstructions, which to a slight and temporary extent occur every year, were by my orders removed as promptly as perceived, for the reason as above stated that I was very anxious to avoid this continual coming into court for the settlement of difficulties with the Pacific Live Stock Company, and I deny that the water was raised in the river by this board, or brush, or debris, or any other acts of mine, or of my servants or agents, a foot higher than the floor of said dam, or in excess of 40 cubic feet of water per second, or any other substantial quantity was diverted into the said ditch.

Answering further paragraph V of the complaining affidavit, I deny that in March or April of 1915, or at any other time, I made, or caused to be made, or suf-

ferred to be made, any of the cuts in the east bank of the east fork of Silvies river, as charged in said paragraph. The banks of Silvies river have been made by a deposit of many years of debris and silt brought down by the flood water, so that gradually the water of the river has been raised in many places to a level or above the level with the surrounding country some distance back from the river and the banks of the river generally are higher than the surrounding country. Therefore, as the river rises it runs out to the low places in the banks of the river and runs away to and spreads over the surrounding lands. Though I was advised that it was not my duty or obligation so to do, yet in order to conserve the water this spring as much as possible within the banks of the river and avoid any captious quarrel with the Pacific Live Stock Company, I filled certain gaps in the river bank which were natural gaps and depressions, but through which a great deal of water could run away as it had always been accustomed to do when the river commenced to rise. While I have no knowledge that any of these have in fact washed out, yet it is possible that this may be so and the work done in filling these gaps may have been mistaken for cuts in the bank, but I emphatically deny that any cuts in the bank were made as alleged in said Paragraph V, or otherwise, or that the banks of the river were in any way altered, except for the benefit of the complainant.

VI.

Answering further said complaining affidavit, I have no knowledge or information sufficient to form a

belief as to how much water of the west fork of the river would be diverted by the dam referred to in Paragraph I of the complaining affidavit and, as already stated, I hold myself responsible for such diversion for the benefit of section 31 as already stated in Paragraph I of this affidavit; but I find that the other charges against me are that I aided and encouraged Young, Hotchkiss and Thornburg in the alleged violation of the terms of the decree set out in Paragraph II and aided and encouraged Hotchkiss and Thornburg as set out in Paragraph III, and aided and encouraged Smith and Thornburg as set out in Paragraph IV, all of which is absolutely untrue and without the slightest foundation and cannot be shown without absolute perjury; and I am charged by Paragraph V with permitting one board to be half way across the dam in section 21 and suffering brush and debris to collect; with permitting the timbers of an old bridge which had been destroyed to fall in and lodge in the river and maintaining another bridge over the river, the stringers of which are set into and over the banks of the river, and permitting the carcasses of dead cattle and hogs and other material to collect and obstruct the channel, all of which I deny and which is absolutely untrue, except that I have constructed a new bridge as a matter of greater convenience and to save distance in hauling, but neither the old bridge nor the new bridge can or does obstruct the flow of the river. We keep all stock away from the channel of the river during the winter time for fear of their breaking through the ice and drowning. I heard this winter that there was one hog in the channel drowned, and that is all in

this connection which ever came to my knowledge. I further say that with the exception of the matters in the first paragraph alleged, all these charges and complaints are frivolous and if the facts were true the obstruction to the flow of the river would be petty and immaterial and nothing which could not be quickly remedied and removed without going into court, by simply calling my attention to the matter, or to the attention of any of my representatives, in a neighborly manner, because my representatives have had express instructions during my absence to give an excess of attention to any complaints of the Pacific Live Stock Company and to see if we could not get into something like neighborly living; but on the contrary, although they must have had somebody making the observations on which the said affidavit is based; though they must have been upon the lands of the William Hanley Company; though in fact I freely granted to their surveyor, whose name I think is Payne, permission to go upon any of our premises for the purpose of measuring the water of Silvies River, his purpose being as he told me to try and determine how much flood water was necessary for the irrigation of specified areas of land, not once has any complaint been made to me, or any of my representatives, or have I had the slightest suspicion that the complaints here charged in this affidavit were being harbored against me; on the contrary, in accordance with my own express wish, which was agreed in by my counsel, Mr. C. E. S. Wood, I determined to make an effort to end this foolish hostility, and this first being informed of a complaint by the service of a writ by a United States Marshal. Having

business in Salt Lake City, I went by way of San Francisco for one purpose among others to see Mr. Tredwell and try and agree with him on some sort of manly and neighborly conduct to at least let each other know of our grievances against each other in a neighborly way, and then if we couldn't agree resort to the court only as a last resort and for some important matter. Mr. Tredwell was himself out of town, but I saw his secretary; explained to him my mission, which he said he would communicate to Mr. Tredwell. Afterwards I received a letter from Mr. Tredwell to the general effect that he thought we could adjust all these little differences and it would be well to do so and to wait until he came up. The letter is at my home office in Burns, Oregon, and I am making this affidavit now away from Burns and sources of information, because of the short time in which I am allowed to appear and show cause; but on my return to Burns I will try and find said letter and send it to my attorneys to be attached as a part of this affidavit. The State Water Commissioners commenced to take testimony in Burns, Harney County, Oregon, adjudicating the water rights of Silvies River, which testimony has been continued until July 12th of this year, but Mr. Tredwell appeared in Burns as the attorney for the Pacific Live Stock Company in this procedure, I would say about the middle of April. At that time we went down the river over this whole portion covered by the complaints in the affidavit on the east fork of the river down to and below what is known as the Orphan's Head Gate, which is in the northeast corner of section 34, belonging to the Pacific Live Stock Company, and

at no time did he mention to me any of these complaints referred to in the complaining affidavit, nor did he make any complaints whatever; but later on, Sunday, April 25, 1915, down at the Island Ranch, the property of the Pacific Live Stock Company, where I had gone partly for the purpose of seeing Mr. Tredwell to endeavor to come to a general understanding, but principally to get Mr. Cochran, the Water Commissioner, and his official stenographer and take them on down to the P-Ranch, I saw Mr. Tredwell and in the course of conversation he exhibited a good deal of feeling or irritation, and instead of going into the matter as I had hoped and expected, he simply directed me to take out the dam in 31, which is referred to in the first paragraph of the complaining affidavit, and said to me that after I had taken it out he would then let me know whether he would sue me or not. I replied, in effect, that the dam had been built by me long ago; that it was never in the decree; that it was on section 31 and watered section 31, which was at that time a Road Land section and was knowingly omitted by Mr. Minor from the litigation. I did not say to Mr. Tredwell, but I do say here, that it was not the policy of Mr. Miller to get into any quarrel at that time with the Road Land people and Mr. Charles Altschul, and that this section was deliberately omitted, but whatever the reason, the record will show that it was omitted. I then went on to say to Mr. Tredwell that my main purpose was to take Mr. Cochran and his stenographer on down the valley; that I would return Monday, the following day, and would be very glad to take up all matters with him in detail and discuss them with him on

the ground for a final settlement and friendly agreement. To this he made no reply that I remember of. I did not see him again until the following day in the town of Burns, when I again endeavored to bring up the subject of our differences and a friendly adjustment of them, but he simply told me that I wouldn't know my dams when I saw them, by which I found he meant he had sent his men onto our property and had them torn out. This is the last conversation I had with Mr. Tredwell on the subject.

I further desire to say that the complainant herein, the Pacific Live Stock Company, is doing all in its power to monopolize the water of Silvies River and to terrify all those who oppose it. That as an instance of such monopoly, which I believe to be lawless, and also as a reason why there is a diminution of water in Silvies River at their own properties, I say that they have been making recent very large diversions of water on their properties in Silvies Valley, which is on the upper part of the river before it reaches Harney Valley, which appropriations of water they have no right to make, but which are appropriations long subsequent to this decree and to rights accrued to numerous settlers and prior appropriators in Harney Valley. I would guess the amount of such diversions to be not less than 100 cubic feet per second, but will endeavor to procure from the State Engineer an exact statement of the amount of water they have applied for and file it as a part of this affidavit. Although Judge Bellinger by his decree in a former contempt proceeding required the complainant to keep in good repair as it then existed the headgate

on their property in the northeast corner of section 34, known as the Orphan Head Gate, they have torn out said head gate and put in a new one of a great deal larger capacity, and have built a high levee, so that they are diverting, or can divert, not less than 30 cubic feet per second, and are carrying said water so that it is entirely diverted from the channel and general drainage of the east fork of the river, and in this connection they have built a levee so that with the ditch from the Orphan Head Gate full of water and unable to carry more, and with the levee acting as a dyke for the purpose of backing up the water to give it gravity flow, they have both obstructed the flowage of flood water off from section 27, the property of the William Hanley Company, and have backed the water of the river back onto said section 27 so that it stands there to a depth of say from two to three feet, destroying the grass on and the value of 160 to 200 acres of said section 27, and this diversion of water is having the effect of absolutely preventing the natural overflow upon and irrigation of sections 2 and 3, which are the property of the William Hanley Company, James Peary and Thomas Houser, holding different parcels in severalty.

WM. HANLEY.

Subscribed and sworn to before me this 1st day of May, 1915.

(Seal)

V. A. CRUM,

Notary Public for Oregon, residing at Portland, Oregon. Commission expires.

Due service of the within motion and affidavit by

certified copy, as prescribed by law, is hereby admitted at Portland, Oregon, May 6th, 1915.

WIRT MINOR,
Of Attorneys for Pacific Live Stock Company.

Filed May 6, 1915. G. H. Marsh, Clerk.

And afterwards, to wit, on the 12th day of July, 1915, there was duly filed in said Court and cause an opinion, in words and figures as follows, to wit;

OPINION.

No. 2577.

*In the District Court of the United States for the
District of Oregon.*

PACIFIC LIVE STOCK COMPANY,

a corporation

Complainant,

vs.

W. D. HANLEY, *et al*,

Defendants.

Edward F. Treadwell and Teal, Minor & Winfree.
for Complainant.

C. E. S. Wood, Erskine Wood, Wood, Montague
and Hunt, and Lionel R. Webster, for Defendants.

WOLVERTON, District Judge:

This is a proceeding charging W. D. Hanley, Henry Luig, George W. Young, Hull Hotchkiss, Carey Thornburg, James Dalton, Robert Hudspeth, and P. G. Smith with contempt of court by reason of wilful violation of certain provisions of the original decree entered in the above entitled cause settling the relative rights of the parties to the use of the waters of Silvies River, and the East and West forks thereof, before entering Lake Malheur. The persons named are charged, some jointly and others singly, and in different relations. It will be sufficient to make a brief statement of the issues presented as we come to them, without setting forth the pleadings in any considerable detail.

Generally, it is alleged that the parties named conspired together for the purpose of diverting water from the East and West forks of Silvies River, in violation of the provisions of the original decree, to the injury of the plaintiff. The evidence does not sustain this charge, and I am persuaded that there has been no intentional, concerted action of the kind.

Specifically, it is first charged that Henry Luig violated the provisions of the decree in that, in the month of April, 1915, he completely closed what is known as the Luig or 31 dam in the West fork of the river, situated in Section 31, township 23 South, Range 31 East, and in this relation it is further charged that William D. Hanley encouraged, advised and assisted Luig in so closing such dam. Luig denies the charge in toto. But, on the other hand, Hanley frankly states the defendant Carey Thornburg put the boards in through his, Han-

ley's direction, and affirms that he had a right so to do, and bases that right upon the alleged facts that one Peter Stenger was, prior to the entry of the original decree, a lessee of Section 31 from Charles Altschul, the section being a part of the grant to the Willamette Valley and Cascade Mountain Wagon Road Company; that Stenger constructed the dam in question for the purpose of irrigating said Section 31; that Hanley, prior to the commencement of the suit and the entry of the original decree, succeeded to the interest of Stenger in his lease and said dam, and that Hanley has, since the entry of such decree, through mesne conveyances, succeeded to the fee simple title of said section. Then it is further alleged that neither Stenger nor Altschul was made a party to the original suit; that prior to the commencement thereof Hanley reconstructed the dam in question, but that Caspar Luig assisted him, and was allowed a joint interest therein with Hanley, and that said dam has been used by the lessees or owners of Section 31 for irrigation of such section continuously to the present time. Hanley was himself a party to the suit, and the decree was entered largely upon stipulation. By the findings of the Court it appears that Caspar Luig owned certain land, and that he had a dam—describing the dam in question. It was stipulated that the decree should provide, and it was thereupon provided, that Caspar Luig might maintain his dam from the 15th of May to the 1st of July each year, “in the manner and form as the same is now maintained,” and “use the waters * * for the purpose of irrigating and in sufficient quantities to irrigate,” certain lands,

describing them, but that, except for the period designated, he should keep said dam open and the channel of the river unobstructed thereby.

A good deal of testimony has gone in respecting this Luig dam, Mr. Hanley asserting, as he alleges in his answer to the charge, that he rebuilt the dam about 1898, that Luig assisted him in the work, and was permitted to have an interest in such dam by reason of such assistance. Hanley evades the inquiry as to whether Luig was using the dam at and prior to the time of reconstruction by saying merely that "Mr. Luig assisted me in putting it in." But later he admits that Luig, or rather the two Luigs, Caspar and Henry, had something to do with the Stenger dam. Henry Luig has succeeded to Caspar's interest in the dam in question. The old dam (perhaps the Stenger dam), it must be stated, was somewhat above the present location, and had been washed out. Mr. Hanley positively denies that Luig has been operating this dam under the decree ever since the time it was rebuilt, but further asserts that every year since the entry of the decree he has positively violated the provisions thereof with respect to such dam. When pressed, however, on the subject he says, "I wouldn't want to go back further than Mr. Thornburg without giving it a little special thought," and finally admitted that, beyond that, he could not state any specific time that he had "given an order on this dam," that is, regardless of any decree. Finally this question was propounded to him: "There is no question about this dam being used, Mr. Hanley, every year. I am asking you, has this dam been used before the time the

decree permitted it to be used, on the 12th day of May or the 15th day of May, I believe it is, by this decree? That is what I am asking you." To which he answered: "Well, I am not prepared to state right now, Mr. Treadwell, but I will say this, to make it plain, that I did order the boards put in this year."

George W. McLaren testifies that he had, in some of the previous years put the boards in earlier than the 15th day of May. Henry Luig, however, testifies, that Sam Voegtly put the first dam in in Section 31, which was about 1886, that they used the dam every year until his brother's death, and since then he has used it every year, and that they put in a new dam in 1905 or 1906; that he does not know whether there was any talk with Hanley about it when the new dam was put in, the same having been constructed in his absence, by his brother, and he does not know whether Hanley assisted in constructing it or was given an interest in it, but he is positive that when the first dam was built Hanley was not asked anything about it, nor did he ever have anything to do with it until the new dam was put in, in 1904, '05, or '06. Witness further states that, ever since he has had charge of the property, he has put the boards in about the 15th day of May, and not before.

In the light of this testimony, it is difficult to believe that Mr. Hanley ever acquired any interest in this dam. But if he had an interest therein, as he alleges, he acquired it before the suit was commenced or the original decree entered. He was a party to that suit, and responded in so far as to set up his interest in other

leased lands, and it is very natural to assume that if he had an interest in this dam at the time, and was using it for the irrigation of Section 31 and Section 5, as he now alleges he is using it, he would have set it up at that time, and had his rights declared. He knew, of course, that the specific uses to which the dam could be put were being declared, and that its use was being limited by the decree to the irrigation of the Luig lands, and none other, and, thus restricted, it could not be used for the irrigation of sections 31 and 5, and, having this knowledge, he failed to assert his interest therein. It is too late now for him to assert any interest in this dam. The decree has specifically declared its status and limited its use, and it can be used for no other purpose without a violation of the decree; and this would be so whether the attempted use was by a party to the suit or by a party not related thereto, until otherwise declared, which would require a modification of the decree. Sec. 268 Judicial Code. *United States v. Debs*, 64 Fed. 724, 755; *Ex parte Stickney et al*, 40 Ala. 160.

It was a violation of the decree, therefore, for Hanley to close the Luig dam prior to May 15th, as he did in the present instance. Luig evidently has not intentionally violated the decree.

The second paragraph of the charges relates to the alleged construction by George W. Young, Hull Hotchkiss and Carey Thornburg of a new dam across the West fork of Silvies River, some distance above the location of the old dam permitted by the decree, and known as the Young dam. It is complained that the

new dam is constructed with a permanent board across the floor, which raises the water in the stream at all times about a foot and three inches, and a new ditch leading from above said new dam onto the lands of Young, Hotchkiss and Thornburg, and that by means of such ditch and dam water was diverted during the month of April, 1915, in excess of two cubic feet per second, in violation of the provisions of the decree respecting said Young dam and the use thereof. In this relation, it is also alleged that these defendants, in the construction of said new dam and the diversion of the water from the stream, have been acting under the advice and encouragement of the defendant William Hanley.

Young, Hotchkiss and Thornburg deny any violation of the decree in respect of the matters complained of, and set up that Young constructed the dam for Hanley, and describe the manner of its construction, namely, that a board is placed across the floor of the dam as a necessary part of the structure, which results in raising the water from 8 to 10 inches above the level of the framework of the dam. It is further alleged that the framework constitutes practically no obstruction to the flow of the water in the stream.

Mr. Hanley denies any collusion or intentional, concerted action with the defendants last named, with a view to diversion of the stream as alleged, but he claims ownership for himself as it respects the dam, and asserts a right to use the same for diverting water to irrigate Section 29.

Mr. Griffing made observations and measurements respecting the Young dam, the new dam, on April 24 and 25, 1915. He found an old ditch on the west side of the river, running westerly along a road through the Young and Hotchkiss property; also a new ditch constructed from above the new dam, and running into the old ditch; that water was running from the river, through the new ditch into the old, and thence out through it, spreading into the county road, and continuing into Hotchkiss' fields south; that the old ditch was shut off from the main stream by a headgate, and that the water as contained in the ditches stood more than 1.8 feet above the water in the river. He affirms that the water could not naturally flow into the old ditch from the river at that time, and that by use of flashboards put in the dam the water above the dam was raised to the extent of 1.8 feet above the water in the stream below.

Gilcrest corroborates Griffing as to the diversion of water on the 25th of April, and states that Young was there at the time. Treadwell asserts that Hanley told him, in effect, that his tenant was using the Young dam.

Mr. Young in his testimony disclaims any interest whatever in the new dam, and states that Hanley uses it for the irrigation of Section 29, and that witness has made no use of the dam this year at all. He is of the opinion that the permanent board in the dam raises the water about 8 inches, and that the permanent boards in the old dam raised the water 30 inches above the floor,

and that this was the case at the time of the entry of the decree. It may be stated in this connection that the new dam is situated from 900 to 1000 feet above the old on the stream.

Hull Hotchkiss asserts that the permanent boards in the old dam raised the water in the stream about 30 inches, and in the new dam around a foot; and that, as constructed, the water in the new dams stands about on a level as it stood with the old dam in place. The old dam has not been used for the last seven or eight years, and witness indicates his intention of putting in a dam where the old one is located, and says that Young is going to join with him in its construction.

Thornburg denies having anything to do with diverting water from above the new Young dam, or having any ownership in the dam, although he admits getting the use of what surplus water passes over the Hotchkiss place.

Mr. Hanley testifies that he took over the Young dam from Young, and that he (Hanley) is really the owner of it; that Young was about to remove it on account of a contempt proceeding which he had recently been through, and the witness took it off his hands, and now asserts the right to use it for diversion of water for irrigation of Section 29. Charles Altschul was the owner of Section 29 at the time of the institution of the suit and the entry of the original decree, and the Hanley Company is the successor to Altschul in the title to the land, and by reason thereof the Hanley Company claims the right to maintain the dam and operate

it for the irrigation of said Section 29. Altschul was not a party to the original suit. Hanley denies, however, that any water was diverted this year by means of the dam upon the east side of the river for irrigation of the Hanley Company's Section 29.

In so far as Young is concerned, as it relates to his use of water, that has been twice settled, by two decrees, the original decree and that entered when the cause was before Judge Bean. Judge Bean says: "The construction of the new flume or ditch in 1911, if intended to be used for irrigation, was contrary to the terms of the decree;" and hence Young was relegated to the use of the old ditch on the west side for irrigation purposes on that side of the river. The Court at that time further held that he had no right to permit water that he did not use to go down onto Hanley's section 29—Young being entitled to sufficient to irrigate his own land—and that, although he may have use for less water now than formerly, he is confined to his actual use and need, and the surplus must go down the channel of the river. As respecting this dam, and the use of the water therefrom, the decree is explicit. It provides that Mrs. A. E. Young and George W. Young "may maintain one dam * * * where a dam is now constructed and built * * * and the ditches maintained in connection with said dam by the said defendants (Young & Young) jointly or severally, and by means of such dam and ditches may obstruct and divert waters from the West fork of Silvies River from the 12th day of May to the first day of July in each year in sufficient quantities and for the purpose of irrigating the lands (describing them),

and shall have the use and enjoyment of such waters as may flow from the West fork of Silvies River while the channel of said river is unobstructed, and from natural causes at all times when the same shall flow upon said lands of said defendants by overflowing the banks of said river or by flowing through the ditches of said defendants while the flow of the water in said river is unobstructed by the dams on said lands."

The decree further provides that Hotchkiss and Voegtly (the latter being succeeded by Thornburg in his land holding), may jointly have one ditch leading from the Young dam, by which they may divert water from the river upon their premises, within the time limits fixed as respects the Youngs, and with the same right to the use of such waters as might flow upon their lands with the river unobstructed.

Now, there can be no doubt that flash-boards were put in the new dam for the purpose of diverting the waters at times other than as permitted by the decree for diverting water by means of the old dam, and that water was actually being conveyed upon the west side from the stream by means of the new connection and the old ditch. Griffing says he saw the flash-boards in the dam, and all concur in having seen the water in the old ditch and running out upon both sides of the road. Young affirms that he has used none of the water this season, Hotchkiss knew, however, that the water was coming through and upon his land, and Thornburg declares his willingness to use any surplus that might come down to him. So that, while Young should be

exonerated, Hotchkiss and Thornburg must be held to a violation of the decree.

Their especial defense is that the new dam does not raise the water any higher in the stream than the old dam did, at the location of the new dam. The old dam, they say, raised the water in the stream about 30 inches, while the new raises it from 8 inches to a foot. It appears that the stream is sluggish, and the fall something like three feet to the mile—not over that. If this be true, the fall between the dams is only six or seven inches, so that the defendants have over-proven their case, because the difference between one foot and 30 inches is 18 inches. Making allowance for six or seven inches fall, their new dam would still lack 11 or 12 inches to raise the water to the height of the old dam. It is very plain to my mind that a dam, with permanent boards raising the water in the channel of the river 30 inches, is an obstruction to the natural flow of the stream, and that the old dam was such an obstruction if it raised the water as seems to be claimed for it, and its maintenance in that way was a violation of the decree.

Hanley could acquire no better or superior right or interest in that dam by purchase from Young than Young had primarily. And as to the claim of Hanley that he helped to construct the dam, he could acquire no right to the use of the water thereby, for the reason that the dam was treated of by the decree. Young, Hotchkiss and Voegtly were permitted to maintain one dam at or near the locality where the old dam was located at the time of the entry of the decree, which

dam when open should not unnecessarily obstruct the flow of the water in the stream. And the fact that Hanley assisted in the construction of the new dam could give him no greater rights than the original parties had to the use of the old dam. Furthermore, Hanley was a party to the original suit, and he is bound, as in the case of the Luig dam, by the terms of the decree respecting the particular dam. Judge Bean, in the Young contempt proceedings, has held that Hanley could get none of any surplus water there might remain over Young's use; and he certainly has none that the decree has given him; so he violates the decree when he attempts to use any by virtue of the Young dam, whether old or new.

I am persuaded that the new dam is not in the approximate location of the old, and that it, with its new diversion by means of the new ditch and flume which Judge Bean condemned, and the additional diversion upon the east side, which was also condemned, is not such a structure as was contemplated by the decree, and should be removed, and a new dam constructed at or near the location of the old, to conform with the intent and purpose of the decree.

The third paragraph charges Hull Hotchkiss and Carey Thornburg with having closed, in part at least, a dam known as the old Voegtly dam, situated in the southeast corner of the southwest quarter of Section 30. The defendant Hotchkiss answers that he has no interest in this dam, and has had nothing whatever to do with its management. Thornburg, who is the successor to

Voegtly in the ownership of the southwest quarter of Section 30, answers that the Voegtly dam has been maintained in the river at the same location for about 20 years, and has been used every year during the irrigation season, that is, from May 12 to July 1, for irrigating part of the Voegtly land.

The decree shows that, by stipulation of Hull Hotchkiss and C. H. Voegtly, they were entitled to maintain one or more ditches, jointly or severally, from the old Young dam, and to divert water from the river in sufficient quantities to irrigate the lands of Hull Hotchkiss, being the east half of the northwest quarter and lots 1 and 2 of Section 30, and the lands of C. H. Voegtly, being the east half of the southwest quarter and lots 3 and 4 of Section 30. The decree contains no provisions or reference to the Voegtly dam whatever. Voegtly was a party to the suit, and manifestly at that time was the owner of the east half of the southwest quarter and lots 3 and 4 of Section 30, because he stipulated concerning the premises, and from what source he should receive the water for their irrigation, and it was not from the Voegtly dam, but from the Young dam.

Thornburg has succeeded by title to Voegtly, and can claim nothing except what Voegtly could have claimed under the decree, as it respects the water privileges.

The evidence shows that Voegtly constructed the Voegtly dam, the old dam, in 1895, which was prior to the institution of the suit and the entry of the original decree, and it must be assumed, he being a party to the

suit, that he waived his right to the further use of that dam by stipulating that he should have the right to sufficient water from the Young dam to irrigate his land, and of course he could not claim the right now to use from the Voegtly dam for irrigating the same premises. Neither could Thornburg claim such a right, holding from Voegtly. Thornburg, notwithstanding, claims he gets the most of his water for irrigating his land from the old Voegtly dam. This is done by putting boards in the dam and making it overflow the banks in "little natural cuts that are there," and by sub-irrigation when the banks are full, the water being backed up by the dam. A ditch leads out from the dam, but it is used as a drain ditch rather than for irrigation, and during irrigation time it is closed. Thornburg claims also to have used the dam in this way right along for 15 years, the time of use running each year from May 12th to July 1st, and that he supposed all the while that the dam was specified in the decree and its use regulated. In this supposition he is mistaken. He does not rely upon a prescriptive right, however, but upon a right acquired from Voegtly. That right pertains only to the Young dam, and none, as we have seen, can be deraigned on account of the Voegtly dam, because all rights thereto are precluded by the original decree. The old dam should therefore be removed.

The fourth paragraph charges that P. G. Smith and Carey Thornburg constructed a new dam of rock and wood a short distance above the old Voegtly dam, with an opening therein of 12.3 feet only, while the old dam was provided with an opening of 23.5 feet, and that the

floor in the new dam is 1.2 feet higher than the floor of the old, and that the new and old dam are raising the water in the stream in excess of one foot in the channel. The testimony shows that such a dam has been recently built, that Thornburg constructed the same, and that Smith was employed by him in doing the work. Thornburg having no right to the use of the old Voegtly dam, he has no right to construct or to use this one. He must look to the Young dam for the irrigation of his premises. The new dam should also be removed.

The fifth paragraph charges that William Hanley, during the months of March and April, 1915, kept open the head of a certain drain ditch, known as the Hanley drain ditch, running from the East fork of the river, when there was no necessity therefor, contrary to the provisions of said original decree; that during the months of March and April of the same year he maintained a board part way across his 21 dam, and permitted and suffered an accumulation of brush and debris to gather above the same, so that it became obstructed and raised the water to the extent of a foot above the floor of the dam, and by means thereof diverted water into the Hanley upper ditch in excess of 40 cubic feet per second; that Hanley made diversions of large quantities of water from the stream by means of cuts in the banks of the river, specifically describing two of them, and naming the others as numerous smaller cuts, all from the East fork and upon the lands of Hanley; and that Hanley had further obstructed the channel of the river, by maintaining therein the timbers of an old bridge, by constructing a new bridge, with the

stringers let down below the tops of the banks, and also by permitting the carcasses of dead stock and other material to become lodged in the channel; all contrary to and in wilful violation of the original decree.

I need not stop to discuss the alleged obstructions by means of the bridges and the dead carcasses in the river bed, as I think none of them has materially obstructed the flow of the water in the stream. The old bridge might, with good propriety, be removed. Whatever dead stock may have been found in the channel, Hanley was not responsible for. But the charges as to the drain ditch, dam 21, and diversion by cuts in the banks of the river require more particular consideration.

Griffing found the drain ditch open on the 3rd and 8th of April, and diverting 30 second feet of water by practical measurement. It was closed later, some time between the 8th and 12th of the month. Ben Newman noticed the drain ditch taking water from the channel all through March and up to the 8th of April. He replaced the boards at times, but they were taken out again until about the 8th of April, when the dam was securely closed. Mr. Hanley does not deny that the headgate was open to some extent at times during the spring, and seeks to excuse the situation on account of the accumulation of ice in the stream, so that it was necessary to have the ditch open to some extent for getting rid of the surface water, and he further states that he ordered the gate closed early in April. This must have been, considering the testimony of Griffing

and Newman, after the 8th, when the gate was well closed.

There has been a great deal of controversy about this drain ditch—how and when it shall be used, and for what purposes. One thing seems to be settled, and that is, that its primary use is not for irrigation, but for drainage purposes only, and that from certain specified lands of Hanley. “Beyond that limited purpose,” says the Court of Appeals in a former contempt proceeding in this cause (200 Fed. 468, 484), “he is by that decree expressly enjoined from maintaining or using that ditch or any of the water thereof; and it necessarily follows that neither Hanley nor his successors in interest have any right to thereby divert any water from the river when its waters are not so high as to make it necessary or proper by means of the drain ditch to drain surface water from the lands specifically described in the 11th subdivision of the original decree.”

Before concluding whether this ditch was kept or allowed to remain open contrary to the spirit of the decree, it is necessary to examine in connection therewith the charges relating to dam 21 and the cuts in the banks of the stream.

As to the 21 dam, Mr. Griffing found a board across one of the four openings in it, and across the other three openings were lodged brush and debris, some of the brush having the appearance of being recently cut and thrown in the stream, which had the effect to raise the water in the stream to the extent of nine-tenths of one foot or a foot. This was ascertained by observations

taken at the time. At the same time he ascertained that Hanley's east ditch, leading from above the dam, was taking 40 second feet of water from the stream. Those conditions extended from the first until the 25th or 26th of April, 1915. Mr. Gilchrist also saw the dam when in the condition described by Griffing.

Mr. Hanley disputes Griffing and Gilchrist, and says he was at the dam about April 20th, and found no boards in either of the openings, and but a slight drift of brush, which he thinks could not have caused 40 second feet to flow out of the ditch on the east. Hanley at once gave orders that whatever brush or debris was in the dam was to be removed. Mr. McLaren, Mr. Hanley's witness, however, saw the board in the dam, but minimizes the effect of the willows and debris in the stream. He says he pulled out the largest of the willows, and the rest went down stream, and he raised the board so as to be no obstruction. There was at least inexcusable neglect of this dam by Hanley, whereby a greater flow of water was forced out of the east ditch and upon his lands during the time mentioned by Griffing than he was justly entitled to, seeing he is the manager of all of the Hanley Company's property. If Mr. Hanley did not know the condition at this dam, he ought to have known it, with the opening of the high water in the spring, and when he was entitled to no water at that juncture except such as would naturally overflow the banks and be conducted through the canals without obstruction in any way of the main channel of the stream.

Now, as to the cuts in the banks, Griffing, in his examination made for the express purpose of ascertaining the condition of these streams and the dams and obstructions therein, found a break or cut in the right or west bank of the river, about 1000 feet above the intake of the drain ditch, opening directly onto Hanley's Section 27. This break or cut was diverting, as near as the witness could get at it, about 50 second feet of water. He found another cut, below the drain ditch from 900 to 1000 feet, in the east bank of the river, taking out about the same number of second feet of water. This was also on Hanley's section 27. And below that again, on the same section, was another break, taking out 5 or 6 second feet. Still below, and on Hanley's section 35, was another, diverting about the same amount of water as the last. Besides these, there were other smaller ones, of which witness was unable to get measurements or estimates. Below all these breaks and diversions, Mr. Hanley was diverting practically all of the water that was left in the channel, by means of a dam in section 3 of the township adjoining the one in which previous diversions were being made. As to this dam, Hanley's right to its use at the time complained of has been previously established by decree of this Court. The result, however, of these diversions in the various ways above indicated was to prevent any water of any material or beneficial quantity from running down to the lands and premises of plaintiff for use by it. That the most important of these breaks existed in some manner in the banks of the river can hardly be questioned. What Mr. Hanley has to say about them is contained in part in the following record:

“Q. Now, you are accused of making cuts in the river bank through 27, for the purpose of facilitating the slopping over of the river for your benefit on that section, and there are some photographs here, or at least one, which I think I showed you, with a pole stringer across the gap, and some perpendicular boards laid in. I wish you would state whether you cut any gaps in the river bank at all, or did anything to lower the level of the bank, so as to aid the water of the river getting out?

A. I have had a man upon section 3 working on the river, with an assistant whenever he needed it, with special instructions to keep those gaps closed up; and when I went down with Mr. Treadwell, it was the first time that I had been down along the channel this season after the water came, and the water was running out every place and, of course, there might be some little nicks where it would cut; but I have no knowledge of any such a place being on the river; and if it were, why, it was just because it had broke itself out. There are dikes built along there, and they are not really overly substantial, most of them, and when the water breaks through a couple of feet above the surface of the ground, if it gets started once, those places cut out very quickly. If there were any place there, it certainly cut out. The man that was down there had full instructions to close them up, and I have brought him here as a witness. Q. What do you mean by ‘cut out?’ Cut out by your men, or by the action of the water? A. Cut out by the water—by the water. Q. You say you gave instructions that the low places should be repaired or filled, and the water kept in the river as far as possible;

but do you know whether they were carried out or not?

A. Well, this time that I went with Mr. Treadwell down there, and I know the river very well, it was in very good repair. It was an excessive amount of water to have, to go over the bank, the way we have operated it ordinary years. Q. Regardless of this year, and the strict language of this charge, have you ever sent out men, or given orders to have the natural bank of the river artificially cut into to let it out on your land? A. No, sir.

COURT: Do you know of any cuts being made without your order? A. Oh, no, there have been no cuts made by our people.

COURT: Or anybody else? A. No, by anybody else. I do not think there have been any cuts made. If there is any cuts in there, they have washed out.

COURT: It is a wash? A. Yes, the water goes out of there very swift.

Q. Now, there was something said by Mr. Griffing when he was on the stand, that he saw shovel marks, or spade marks on the edges of these cuts, showing that they had been artificially made. Do you know anything about that? A. Why, I don't know anything about it. If they were, it was probably made by the man that was in charge just stopping up those places. Probably the places that he put in went out; but I didn't have any personal knowledge, of inspection."

Mr. Hanley further insists that no one let him know about these breaks, whatever they were, and asserts that rather than have any feeling about the matter he would

a hundred times rather stop them. Further he insists that those breaks in the river were kept closed up, that the company had men working along this season "to specially look after them," and that some of them "apparently have been filled up with boards, and manure put up against them."

McLaren, who was in the employ of Hanley, testifies that "Generally every fall we went around with scrapers and fixed any places that were wearing out, or any breaks that come in, in the freshets, that were fixed temporarily, we would make them permanent as we could—rebuild levees."

Ryan testifies that the structure put in the break above the drain ditch was temporary, to stop the river going out; that while the water is high at all it cannot be fixed permanently; that he repaired two breaks on the east side of the river; the first below the drain ditch, which he repaired, he admits was 3 feet in depth and 12 feet in width. Ryan further testifies that Hanley directed him, along about the 3rd or 4th of April, to close up all these breaks immediately. With all this, there is small refutation of the representation of Griffing as to the amount of water escaping by these breaks in the river banks.

Beyond this testimony, the fact abundantly appears that the flood waters this year were much lighter than usual. Indeed, some of the witnesses assert that the overflow was very slight. Notwithstanding, however, large quantities of water escaped from the East fork of the river, to such extent that Hanley's section 27, upon

both the West and the East side of the channel, was abnormally flooded through the breaks and cuts in the banks, and water was escaping upon Hanley's section 35 also from like sources.

Hanley complains that the Orphan drain ditch, with its levee on the south, impeded the escape of the flood water from section 27. But its capacity was not to exceed 27 or 28 second feet, and it could not have produced the results he claims for it. Thus Hanley pleads the necessity for the opening of the drain ditch to rid his lands of the flood waters. But he himself, in my candid opinion, was responsible for the overflow of his own lands, and he cannot be heard to make a necessity for opening his drain ditch, and justify himself on that ground. He should have kept these breaks and gaps in the banks of the stream closed, or at least in very large measure. The just implications of the decree require this of him, as he is only given the flood waters to May 5th, and water pouring through rents in the banks cannot be termed flood waters.

The sixth paragraph charges Green Hudspeth and James Dalton with diverting water by means of the People's ditch contrary to the terms of the decree, and about it little need be said. The head-gate was undoubtedly opened by somebody, but I am satisfied that it was by neither Hudspeth nor Dalton, nor were they responsible for the condition. The person next to them to be benefited by the diversion is Hanley; but the proofs do not show that he had anything to do with it, nor Ryan, who was looking after his interests in that locality.

Whether the things that were done were wilfully done, that is, knowingly and purposely done regardless of the positive provisions of the decree and regardless of the rights of the plaintiff, is next to be considered.

I think Hotchkiss and Thornburg are so chargeable. This is the second affair with Hotchkiss. Luig is not, for Hanley lifts the inculcation from his shoulders. Nor is P. G. Smith. He was simply an employee of Thornburg, without purpose except to do his work.

As to Hanley, touching what he did respecting the dams on the west fork of the river, I am disposed to excuse him, on the ground that he seems to have been claiming by an independent right, not theretofore determined. But there is a fact which stands out so patent as not to be overlooked, which is that the waters of both streams, the East and West forks, were so controlled, by diversion and otherwise, that but a very small amount found its way down the natural channels, where they were wont to flow in previous years, to the lands of plaintiff, and the season went entirely by while this condition prevailed. That there was a design in this, no one can doubt. The controlling mind was that of Mr. Hanley. He reaped the benefit everywhere from the diversion, and cannot be chargeable with less than a direct purpose or design to secure benefit for himself and his company at the expense of plaintiff, or at least regardless of hurt or injury to plaintiff. This constitutes a wilful violation of the decree, and must be so held.

It is said that since the submission of this cause Hanley has permitted water to continue down the channels in such quantities that plaintiff's lands have been adequately watered, and will produce a crop. This is a generous and magnanimous impulse, but it only emphasizes the great wrong done by the diversion of the water at a time when, under the decree, plaintiff was entitled to it, as well as the perfect control Hanley seems to have exercised over it.

The finding will be that Hotchkiss may purge himself from contempt by paying the costs of plaintiff respecting this proceeding as incident to him, and, Young being made a party, by removing, in conjunction with Young, the Young dam, with leave to reconstruct the old dam at the place and in the manner defined in the original decree.

That Thornburg may purge himself from contempt by paying the costs of plaintiff incurred by reason of his having been made a party to this proceeding and by removing the new Voegtly dam. He will also be enjoined from reconstructing the old Voegtly dam.

That Hanley may purge himself from contempt, by reason of his manipulation of the 21 dam, the drain ditch, and his inexcusable and purposeful neglect to suitably repair the breaks in the banks of the East fork of the river, by paying all the rest of the costs of plaintiff incurred in instituting and maintaining this proceeding, by removing all obstructions in the 21 dam when not entitled to use it, by closing the drain ditch except at times when he is entitled to use it for drainage purposes,

as defined by the Court of Appeals, and by closing and keeping closed the breaks and gaps in the East fork of the river, appearing therein, and by paying \$250 for the use of plaintiff. This sum I consider in no way compensatory for plaintiff's loss, but I impose it by way of warning against any further contempt of the kind. *Gompers v. Bucks Stove & Range Co.*, 221 U . S. 418.

Hanley will also be enjoined from making any use of the Young and the Luig dams.

And afterwards, to-wit, on Tuesday, the 3rd day of August, 1915, the same being the 26th Judicial day of the regular July, 1915, term of said Court; present: the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

DECREE.

*In the District Court of the United States for the
District of Oregon.*

PACIFIC LIVE STOCK COMPANY,
a corporation,

Complainant,

vs.

W. D. HANLEY, F. L. MACE, H. C. LEVENS,
GEORGE WHITING, THOMAS WHITING, IONE
WHITING, JOHN C. FOLEY, N. BROWN,

J. H. BYERLY, C. P. RUTHERFORD, C. A. SWEET, M. CUSHING, P. M. McMENAMY, JOHN I. NEWMAN, CHARLES NELSON, W. H. MARRS, MANNA MARRS, JOSEPH T. BARNES, WILLIAM CLARK, C. H. VOEGTLY, GEORGE N. YOUNG, MRS. A. E. YOUNG, P. G. SMITH, GREEN HUDSPETH, JAMES DALTON, HULL HOTCHKISS, CASPER LUIG, MRS. F. E. MCGEE, PETER CLEMENS, B. R. PORTER, AND THE HARNEY VALLEY DAM, DITCH AND IRRIGATING COMPANY (a corporation),

Defendants.

and

HARRISON KELLY,

Intervenor.

No. 2577

In the matter of the contempt of William Hanley, Henry Luig, George W. Young, Hull Hotchkiss, Carey Thornburg, James Dalton, and Robert Hudspeth and P. G. Smith.

In the above entitled matter, the defendants having duly appeared and said matter having been presented by counsel for the respective parties, and submitted to the court, and the court being fully advised in the premises and having heretofore made and filed its opinion, and application being made at this time for an order in pursuance of said opinion;

Now, therefore, it is by the court considered, ordered, adjudged and decreed as follows:

1. That in the month of April, 1915, the defendant Carey Thornburg, acting under the direction and control of the defendant William Hanley, closed the Luig dam in the west fork of Silvies river in section thirty-one (31), township twenty-three (23) south, range thirty-one (31) east, by putting boards therein and by means thereof obstructing the water of the west fork of Silvies river and backed the same up the channel of said river, and by means thereof diverted in excess of forty (40) cubic feet of water of the said river, in violation of the terms of the final decree in this cause.

2. That since the entry of the final decree in said cause, the Young dam, situated in the northeast quarter of section thirty (30), township twenty-three (23) south, range thirty-one (31) east, washed out, and thereafter the defendants George W. Young and William Hanley constructed a new dam situated about one thousand (1,000) feet above the location of the old dam, which dam was not authorized by the terms of the said decree, and during the month of April, 1915, the defendants Hull Hotchkiss and Carey Thornburg constructed a new ditch taking out of the west fork of Silvies river above the said dam, and by means of said dam and ditch, and in violation of the terms of the said decree, diverted the water of the said river to the lands of the said Hotchkiss and Thornburg.

3. That in the month of April, 1915, the defendant Carey Thornburg, in violation of the terms of the said decree, placed timbers, boards, and other materials in the skeleton of the old Voegtly dam, situated near the

south line of said section thirty, and by means thereof obstructed and raised the water in said river, in violation of the terms of the said decree.

4. That since the entry of the final decree in said cause the defendant Carey Thornburg, assisted by the defendant P. G. Smith, an employee of the said Carey Thornburg, in violation of the terms of the said decree, constructed a new wooden and rock dam in the west fork of Silvies river directly above the said Voegtly dam, and by means thereof obstructed and raised the waters of the said river.

5. That during the months of March and April, 1915, and at times when it was unnecessary to drain water from the lands of the defendant William Hanley, the said defendant William Hanley, in violation of the terms of the said decree, permitted the head of the Hanley drain ditch to be open and by means thereof diverted from the east fork of Silvies river a large amount of water of the said river, and also during the months of March and April, 1915, permitted one board to remain in the Hanley dam in section twenty-one (21), and permitted and suffered a large amount of brush and debris to gather above the said dam, which obstructed and raised the waters of the said river, and diverted the same through the Hanley ditch; and also in violation of the said decree, during the months of March and April, 1915, diverted a large amount of water from said river onto his lands described in said decree by means of cuts in the banks of the said river.

6. That during the month of April, 1915, some persons permitted and suffered the headgate of the People's ditch, referred to in said decree, and situated in section thirty-one (31), township twenty-three (23) south, range thirty-one (31) east to remain open and by means thereof there was diverted a large amount of water from said river, and the same was done in violation of the terms of the said decree, but it is impossible from the evidence to determine who was responsible for the said headgate being opened as aforesaid.

7. That by reason of the premises, the court finds and decides that the defendants William Hanley, Hull Hotchkiss and Carey Thornburg are guilty of contempt of this court for the wilful violation of the terms of the final decree in this cause.

8. That the defendant Hull Hotchkiss may purge himself of the contempt by removing with the defendant George W. Young the said dam constructed near the north line of section thirty (30), township twenty-three (23) south, range thirty-one (31) east, and by paying one-eighth ($\frac{1}{8}$) of the costs incurred by complainant in this proceeding, which said one-eighth of said costs is hereby taxed and fixed at the sum of \$55.45.

9. That the defendant Carey Thornburg may purge himself of the contempt of this court by removing the old Voegtly dam and the new dam constructed by him near the south line of said section thirty (30), and by paying one-eighth ($\frac{1}{8}$) of the costs incurred by complainant in this proceeding, which said one-eighth of said costs is hereby taxed and fixed at the sum of \$55.45.

10. That the defendant William Hanley may purge himself of the contempt in this matter by removing the obstructions in the Hanley dam in section twenty-one (21), and keeping the said dam open as required by the final decree in this cause, and by closing the drain ditch so as to prevent the same from diverting water from said river or from being used except to drain surface water from the lands described in said decree, and by keeping the cuts in the banks of said river on the said property closed and in repair, and by paying the balance of the costs of complainant in this matter incurred, to-wit: six-eighths ($\frac{6}{8}$) thereof, which said six-eighths of said costs are hereby taxed at the sum of \$332.80, and by paying in addition thereto the sum of two hundred and fifty (\$250) dollars for the use of complainant, this latter sum, however, not to be considered as wholly compensatory for plaintiff's loss.

11. That the defendant George W. Young is required to forthwith remove the dam constructed by him near the north line of said section thirty (30), but he may rebuild the old dam in the northeast quarter of said section thirty, and at or near the place where the same was formerly constructed in such a manner that the water of said river shall be unobstructed thereby, except at such times as the said defendant is permitted to use the same in accordance with the terms of the said decree.

12. That the said defendant Carey Thornburg be, and he hereby is, ordered to forthwith remove from the channel of the said river the said old Voegtly dam and the said new dam constructed by him near the south line of said section thirty (30).

13. That the defendant William Hanley be and he hereby is enjoined from using said Young dam situated in the northeast quarter of section thirty (30), or the said Luig dam in said section thirty-one (31).

14. And it is further ordered that the said defendant William Hanley be, and he hereby is, commanded to forthwith remove the remains of the old bridge heretofore maintained by him over the east fork of Silvies river in section twenty-seven (27), township twenty-three (23) south, range thirty-one (31) east.

Done in open court this 3d day of August, 1915.

CHAS. E. WOLVERTON,
District Judge.

Filed August 3, 1915. G. H. Marsh, Clerk.

And afterwards, to-wit, on the 20th day of August, 1915, there was duly filed in said Court and cause a Petition for Appeal, in words and figures as follows, to-wit:

PETITION FOR APPEAL.

*In the District Court of the United States for the
District of Oregon.*

PACIFIC LIVE STOCK COMPANY,
a corporation,

Complainant,

vs.

W. D. HANLEY, F. L. MACE, H. C. LEVENS,
GEORGE WHITING, THOMAS WHITING, IONE

WHITING, JOHN C. FOLEY, N. BROWN,
J. H. BYERLY, C. P. RUTHERFORD, C. A.
SWEET, M. CUSHING, P. M. McMENAMY,
JOHN I. NEWMAN, CHARLES NELSON,
W. H. MARRS, MANNA MARRS, JOSEPH T.
BARNES, WILLIAM CLARK, C. H. VOEGTLY,
GEORGE W. YOUNG, MRS. A. E. YOUNG,
P. G. SMITH, GREEN HUDSPETH, JAMES
DALTON, HULL HOTCHKISS, CASPER LUIG,
MRS. F. E. MCGEE, PETER CLEMENS, B. R.
PORTER, AND THE HARNEY VALLEY DAM,
DITCH AND IRRIGATING COMPANY (a corpo-
ration),

Defendants.

and

HARRISON KELLY,

Intervenor.

PETITION FOR ALLOWANCE OF APPEAL.

No. 2577.

In the matter of the contempt of William Hanley, Henry Luig, George W. Young, Hull Hotchkiss, Carey Thornburg, James Dalton, Robert Hudspeth and P. G. Smith.

The above named defendant, William Hanley, conceiving himself aggrieved by the order entered on August 3, 1915, in the above entitled matter, hereby appeals from said order to the United States Circuit Court of Appeals for the Ninth Circuit, and he prays that this his appeal may be allowed; and that citation issue as

provided by law; and that a transcript of the record and proceedings and papers upon which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

The said defendant files herewith his assignment of errors and prays that the amount of a supersedeas bond be fixed.

C. E. S. WOOD,
LIONEL R. WEBSTER
AND ERSKINE WOOD,
Attorneys for Def't Wm. Hanley.

It is hereby ordered that the appeal be allowed as prayed for, and the amount of the supersedeas bond is fixed at One Thousand Dollars (\$1,000.00).

CHAS. E. WOLVERTON,
U. S. District Judge.

Dated August 19, 1915.

Due service of the within petition for allowance of appeal by certified copy, as prescribed by law, is hereby admitted at Portland, Oregon, August 20th, 1915.

WIRT MINOR,
of Attorneys for Complainant.

Filed August 20, 1915. G. H. Marsh, Clerk.

And afterwards, to-wit, on the 20th day of August, 1915, there was duly filed in said court, and cause, an assignment of errors in words and figures as follows, to-wit:

*In the District Court of the United States for the
District of Oregon.*

PACIFIC LIVE STOCK COMPANY,

a corporation,

Complainant,

vs.

W. D. HANLEY, F. L. MACE, H. C. LEVENS,
GEORGE WHITING, THOMAS WHITING, IONE
WHITING, JOHN C. FOLEY, N. BROWN,
J. H. BYERLY, C. P. RUTHERFORD, C. A.
SWEET, M. CUSHING, P. M. McMENAMY,
JOHN I. NEWMAN, CHARLES NELSON,
W. H. MARRS, MANNA MARRS, JOSEPH T.
BARNES, WILLIAM CLARK, C. H. VOEGTLY,
GEORGE W. YOUNG, MRS. A. E. YOUNG,
P. S. SMITH, GREEN HUDSPETH, JAMES
DALTON, HULL HOTCHKISS, CASPER LUIG,
MRS. F. E. MCGEE, PETER CLEMENS, B. R.
PORTER, AND THE HARNEY VALLEY DAM,
DITCH AND IRRIGATING COMPANY (a corpo-
ration),

Defendants.

and

HARRISON KELLY,

Intervenor.

ASSIGNMENT OF ERRORS.

No. 2577.

In the matter of the contempt of William Hanley, Henry Luig, George W. Young, Hull Hotchkiss, Carey Thornburg, James Dalton, and Robert Hudspeth and P. G. Smith.

I.

The court erred in overruling the exception of the defendant, William Hanley, to the affidavit of John Gilcrest, the ground of the exception being that the affidavit did not state that the facts therein charged were within the personal knowledge of the affiant, and if they were not, did not show the sources of this information.

II.

The court erred in finding that the closing of the dam in section 31, township 23 south range 31 east, by Carey Thornburg, under the direction of William Hanley, and the consequent diversion of water from the west fork of Silvies river, was a violation of the terms of the final decree in this cause.

III.

The court erred in finding that the defendant, William Hanley, had permitted the head of the Hanley drain ditch to remain open at any times when it was unnecessary to drain water from the lands of the William Hanley Company.

IV.

The court erred in finding that the defendant, William Hanley, had permitted a board and a large amount of brush and debris to remain and gather in the Hanley dam in section 21, which raised and obstructed the water in the river.

V.

The court erred in finding that the defendant, William Hanley, during March and April, 1915, diverted a large amount of water from Silvies river, on to his lands described in the final decree, by means of cuts in the bank of said river.

VI.

The court erred in finding and adjudging that the defendant, William Hanley had wilfully violated the terms of the final decree in this cause, and that he was therefore guilty of contempt of court.

VII.

The court erred in requiring the defendant Hanley, in order to purge himself of contempt, to do, among other things, the following, to-wit: to keep closed and in repair the so-called cuts in the banks of said Silvies river, on the lands of the Wililam Hanley Company.

VIII.

The court erred in requiring the defendant, George W. Young, to remove the dam near the north line of

section 30, this dam being the property of the William Hanley Company.

IX.

The court erred in enjoining the defendant, William Hanley, from using the so-called Young dam situated in the northeast corner of section 30, and the so-called Luig dam in section 31.

X.

The court erred in making and entering its order of August 3, 1915, adjudging and decreeing the defendant, William Hanley, in contempt, and erred in finding that he was guilty of any contempt whatever, either wilful or otherwise.

C. E. S. WOOD,
LIONEL R. WEBSTER
AND ERSKINE WOOD,
Attorneys for Defendants.

Due service of the within assignment of errors by certified copy, as prescribed by law, is hereby admitted at Portland, Oregon, August 20th, 1915.

WIRT MINOR,
of Attorneys for Complainant.

Filed August 20, 1915. G. H. Marsh, Clerk.

And afterwards, to-wit, on the 20th day of August, 1915, there was duly filed in said court, and cause, a bond on appeal, in words and figures as follows, to-wit:

BOND ON APPEAL.

*In the District Court of the United States for the
District of Oregon.*

PACIFIC LIVE STOCK COMPANY,

a corporation,

vs.

W. D. HANLEY ET AL.

In the matter of the contempt of William Hanley,
et al.

Know All Men by These Presents, That we, National Surety Company, of New York, are held and firmly bound unto the above named Pacific Live Stock Company in the sum of (\$1000.00) One Thousand Dollars, to be paid to the said Pacific Live Stock Company, its successors or assigns, to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally and our and each of our heirs, executors and administrators, firmly by these presents.

Sealed with our seals, and dated August 20th, 1915.

Whereas, the above named William Hanley has appealed to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the order and decree in the above entitled cause by the District Court of the United States for the District of Oregon, made and entered August 3, 1915.

Now, therefore, the condition of this obligation is such, that if the aboved named William Hanley shall

prosecute said appeal to effect, and answer all costs and damages if he shall fail to make good his plea, than this obligation shall be void; otherwise to remain in full force and virtue.

Signed, sealed and delivered in presence of

CLARENCE D. PORTER.

L. A. WEST.

NATIONAL SURETY COMPANY,

By J. C. AINSWORTH,
Resident Vice President.

Attest: JAS. McI. WOOD,
Resident Assistant Secretary.

Countersigned:

JAS. McI. WOOD & Co., Agents.

By JAS. McI. WOOD,
One of the firm.

Approved: August 20, 1915.

CHAS. E. WOLVERTON,
Judge.

Filed Aug. 20, 1915.

C. H. Marsh, Clerk.

And afterwards, to-wit, on Friday, the 12th day of November, 1915, the same being the 11th Judicial day of the regular November, 1915, term of said court; present: the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

ORDER DESIGNATING RECORD
ON APPEAL.

*In the District Court of the United States for the
District of Oregon.*

PACIFIC LIVE STOCK COMPANY,

Complainant.

vs.

W. D. HANLEY ET AL.,

Defendants.

and

HARRISON KELLEY,

Intervenor.

In the matter of the contempt of William Hanley, Henry Luig, George W. Young, Hull Hotchkiss, Carey Thornburg, James Dalton, Robert Hudspeth and P. G. Smith.

The appellant, by his attorney Erskine Wood, and the appellee by its attorney, Mr. Wirt Minor, having this day appeared for the purpose of submitting their differences as to the general contents of the record on appeal in this cause,

It is now ordered that the transcript on appeal which shall be printed, shall comprise the following:

Stipulation for the use on this appeal of the complaint and final decree in the original cause, both of which have already been printed and are on file in the Circuit Court of Appeals for the Ninth Circuit, in the

cause numbered in that court 2036; all of the affirmative part of the answer of defendant W. D. Hanley to the original bill of complaint, to-wit: Commencing at line 22 on page 162 of part 1 of the judgment roll, in the original cause, and extending to the end of said answer; the affidavit of John Gilcrest sworn to on the 26th day of April, 1915; the order, based on said affidavit, to defendant Hanley to show cause why he should not be adjudged in contempt; defendant Hanley's motion and affidavit sworn to on the first day of May, 1915; statement of the evidence as prepared by the appellant and lodged with the Clerk of this court; Def. Exhibits A and B filed May 12, 1915, the opinion of Judge Wolverton in this cause, and the decree of August 3d adjudging defendant Hanley in contempt; defendant Hanley's petition for the allowance of appeal; assignments of error, citation on appeal, supersedeas appeal bond; the various orders extending the time to the parties hereto for settling this record on appeal and for having said record printed; the order directing that the testimony on this appeal may be reproduced in the exact words of the witnesses; and this order; Complainants Ex. 4, filed December 17, 1910.

It is further ordered that the opinion of Judge Bean in the original contempt case against George W. Young, and the opinion of Judge Bellinger, filed Feb. 21, 1905, in the first contempt proceeding against W. D. Hanley be printed as addenda.

It is further ordered that the whole of the record in this cause, or such parts thereof as the parties may desire, shall be sent to the Circuit Court of Appeals for the

Ninth Circuit to be considered on this appeal and supplement the printed record above ordered.

Dated this 12th day of November, 1915.

CHAS. E. WOLVERTON,

Judge.

Filed November 12, 1915. G. H. Marsh, Clerk.

And afterwards, to-wit, on Friday, the 12th day of November, 1915, the same being the 11th Judicial day of the regular November, 1915, term of said court; present: the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

ORDER PERMITTING TESTIMONY TO BE
REPRODUCED IN EXACT WORDS
OF WITNESS.

*In the District Court of the United States for the
District of Oregon.*

PACIFIC LIVE STOCK COMPANY,

Complainant.

vs.

W. D. HANLEY ET AL.,

Defendants.

and

HARRISON KELLEY,

Intervenor.

In the matter of the contempt of William Hanley, Henry Luig, George W. Young, Hull Hotchkiss, Carey Thornburg, James Dalton, Robert Hudspeth and P. G. Smith.

At the request of Erskine Wood, of solicitors for the appellant, it is hereby ordered that the testimony to be included in the transcript on this appeal shall be reproduced in the exact words of the witnesses.

Dated this 12th day of November, 1915.

CHAS. E. WOLVERTON,

Judge.

Filed November 12, 1915. G. H. Marsh, Clerk.

And afterwards, to-wit, on the 29th day of November, 1915, there was duly filed in said court, the statement of the evidence, in words and figures as follows, to-wit:

EVIDENCE.

*In the District Court of the United States for the
District of Oregon.*

PACIFIC LIVE STOCK COMPANY,
a corporation,

Complainant,

vs.

W. D. HANLEY, F. L. MACE, H. C. LEVENS,
GEORGE WHITING, THOMAS WHITING, IONE

(Testimony of W. A. Griffing.)

WHITING, JOHN C. FOLEY, N. BROWN,
J. H. BYERLY, C. P. RUTHERFORD, C. A.
SWEET, M. CUSHING, D. M. McMENAMY,
JOHN I. NEWMAN, CHARLES NELSON,
W. H. MARRS, MANNA MARRS, JOSEPH T.
BARNES, WILLIAM CLARK, C. H. VOEGTLY,
GEORGE N. YOUNG, MRS. A. E. YOUNG,
P. G. SMITH, GREEN HUDSPETH, JAMES
DALTON, HULL HOTCHKISS, CASPER LUIG,
MRS. F. E. MCGEE, PETER CLEMENS, B. R.
PORTER, AND THE HARNEY VALLEY DAM,
DITCH AND IRRIGATING COMPANY (a corpo-
ration),

Defendants.

and

HARRISON KELLY,

Intervenor.

In the matter of the contempt of William Hanley,
Henry Luig, George W. Young, Hull Hotchkiss,
Carey Thornburg, James Dalton, Robert Hudspeth,
and P. G. Smith.

W. A. GRIFFING,

A civil engineer in the employ of the Pacific Live Stock Company. During the months of March and April, 1915, and up to the present time he has been employed in Harney Valley in gathering information in connection with the adjudication of the water rights on Silvies river.

(Testimony of W. A. Griffing.)

DIRECT EXAMINATION.

Questions by Mr. Treadwell.

Q. Now, going to the east fork of the river, do you know the Hanley drain ditch?

A. Yes.

Q. It is marked on that map, is it, the location of it?

A. Yes, it is marked here.

Q. In what section?

A. It is taking out of the river in the northeast quarter of section 27, same township and range. (Township 23 south, Range 31 east, Willamette meridian.)

Q. Did you have any occasion to examine that ditch, as to whether or not it was diverting water during the period you have covered by your testimony?

A. Yes.

Q. Was it diverting the water from the river?

A. Yes, it was diverting water from the river.

Q. How much water was it diverting?

A. 30 second feet.

Q. You measured that water, did you?

A. I measured the water personally, yes, sir.

Q. When was it that you saw it doing that, Mr. Griffing?

A. The first measurement I took was on April 3rd. I had seen the water in the ditch running over the head-gate, though, previous to that, several days.

Q. Did you actually measure it on April 3rd?

A. April 3rd and April 8th.

Q. Both times it was taking this 30 feet of water?

(Testimony of W. A. Griffing.)

A. Both times it was taking about 30 second feet of water.

Q. Was it subsequently closed, Mr. Griffing?

A. Yes, it was closed after that.

Q. How was it closed?

A. Closed by putting additional flash boards in the headgate, and stuffing up with straw.

Q. That was done after the 8th day of April this year? Do you know the Hanley upper ditch on 21—ditch and dam?

A. Yes.

Q. That is situated in Section 21 of the same township?

A. Yes, in the northwest quarter. Takes out of the river in section 21, same township and range.

Q. And on the east side of the river?

A. East fork of the river.

Q. Did you examine that during this period to see whether it was taking the water of the river?

A. Yes.

Q. What did you find?

A. I found it was taking water.

Q. About what amount of water did it take, the average amount?

A. The average amount would be very close to 40 second feet.

Q. Forty second feet? During what period was that, Mr. Griffing?

A. That was from the first of April up until the first of May—3rd of May.

(Testimony of W. A. Griffing.)

Q. Did you also examine the Hanley dam, immediately below that ditch?

A. Yes.

Q. What condition did you find that dam in?

A. I found it holding the water up, about a foot by means of brush, which had been lodged in front of it, and one board.

Q. One board?

A. One board.

Q. There are several openings in that dam, are there, Mr. Griffing?

A. Yes, sir, there are four openings.

Q. Across one of these openings you mean there was a board?

A. Yes.

Q. Against the others there was brush?

A. Brush.

Q. What did that brush look like? Any particular examination did you make of it?

A. The brush, some of it had evidently been dead brush and floated down the river, others had the appearance of being cut, either with an axe, hatchet, or something of the kind.

COURT: And thrown in there?

A. Evidently; it had that appearance, had been cut—cut diagonally across the limb of the tree, and was then in the river.

Q. How long did the dam remain in that condition, Mr. Griffing?

(Testimony of W. A. Griffing.)

A. About the first part of April, until the 25th or 26th; something of that kind, or about that time.

COURT: How many openings did you say were in the dam?

A. Four openings in the dam.

COURT: How many contained boards in them?

A. One opening had the boards in them.

COURT: All the other openings contained this brush?

A. Yes, sir. Well, the one with the board in contained brush in front of it.

COURT: You think that raised the water about a foot?

A. Just about a foot, yes.

Q. Did you take observations?

A. I took the observations. It averaged from nine-tenths of a foot to one foot.

Q. That is situated how close below the head of this Hanley upper ditch?

A. It is just immediately below.

MR. WEBSTER: I didn't get the date. He said about the first of April to when?

A. About the 25th of April.

Q. Did you also examine the river down through the Hanley property, as to any other place where water was being diverted?

A. Yes. All along the banks of it, at both sides.

Q. The water was being diverted on both sides down through his property?

(Testimony of W. A. Griffing.)

A. Yes, down through his property.

Q. By what means?

A. By breaks or cuts in the bank. That is, they had the appearance of being cut.

COURT: That was down below this dam?

A. That was down below this dam, yes, we were speaking of.

Q. State the first and the biggest one you have referred to.

A. The first one would be on the right bank of the river, about 1,000 feet above the intake of the Hanley drain ditch on the right bank of the river.

Q. That would be the west bank?

A. It would be the west bank.

Q. That is in Section 27?

A. That is in Section 27, yes.

Q. How much water was being diverted by that, about?

A. As near as I could get it, about 50 second feet.

Q. Fifty second feet?

A. Yes.

Q. What other cut, specifically, are you able to locate?

A. Then below the drain ditch, 900 feet or 1,000 feet, on the left bank, that would be on the east bank of the river, there was a large break there, taking out about 50 second feet of water. Below that again, in the same section, there was another cut taking about $5\frac{1}{2}$ or 6 second feet of water. And then in Section 35, there was another cut, or a ditch, rather, taking out there, that the

(Testimony of W. A. Griffing.)

boards had been in. It was in very bad shape, and was taking about five second feet of water.

Q. Besides these specific ones, were there, or were there not, other small places you didn't mention?

A. There were numerous smaller ones that I couldn't get measurements of, or an estimate of.

Q. After the water had been diverted by the upper Hanley ditch, and by the drain ditch, and by these various cuts that you have referred to, did Hanley have any method of taking the balance of the water out of the river below that?

A. Yes, below that; yes.

Q. By what method did he do that?

A. He had a dam in Section 3.

Q. That is Section 3 of the adjoining township?

A. Of the adjoining township.

MR. WOOD: Just a moment. We object to that as irrelevant and immaterial to this case, being on the Fennimore property, which has already, in a former contempt case, been held by Judge Bellinger as not in the decree, and therefore it could not be tried out in a contempt proceeding.

MR. TREADWELL: We haven't charged anything in regard to that, your Honor, but we want to put it in evidence, for the purpose of showing that during this time Mr. Hanley was not attempting to drain his land, but was irrigating his land and forcing the water over it, in answer to his contention that he had to drain the water out, and that was the reason he was allowing

(Testimony of W. A. Griffing.)

40 feet of water to go down through the drain ditch. We don't charge it as a specific item of contempt. That is the only purpose we want the evidence in for.

MR. WOOD: We object to it, on the ground their affidavit amounts to an information, and nothing can be heard or tried in this case except those things alleged in the information, to which our attention has been invited. They cannot under pretense of illustration, or some other purpose, put us upon trial on a matter they have not made an issue themselves.

COURT: I will hear the testimony.

Q. Answer the question.

A. There is a dam in Section 3, in the northeast quarter of Section 3, which was then diverting all the balance of the water that was going on down the river.

Q. So that below that, the Pacific Live Stock Company received no water whatever?

A. Not from that fork of the river, no.

Q. Now, have you taken some photographs of the various things that you have spoken of?

A. Yes, sir.

* * * * *

Q. I will ask you if you have a picture showing the Hanley drain ditch, as you have testified.

A. Yes. (Witness produces Picture No. 8. "Hanley drain ditch at head.")

Q. Does that water that is there being pictured, flow out of the river, and through the headgate, and down through the drain ditch?

(Testimony of W. A. Griffing.)

A. Yes, that is the water from the river.

Q. When was that picture taken, Mr. Griffing?

A. That was taken on the 8th of April.

Q. Referring to the affidavit of Mr. Hanley, which says that no water was taken through that drain ditch after the middle of March, I will ask you when you bought the camera that took that picture?

A. I bought the camera during the first part of April—after the first of April, I know.

Q. So you didn't own that camera at all, didn't take any pictures until after the first day of April?

A. Until after the first of April, yes.

COURT: Is that dam so constructed that that water can be shut off entirely?

A. Yes.

Q. It was shut off entirely?

A. It was shut off between the 8th and the 12th some time.

MR. WOOD: The 8th and the 12th of what?

A. April.

Q. Now, have you another picture of that drain ditch?

A. Yes, showing the head on the river side, the entrance to the old dam. (Witness produces No. 9.)

COURT: From what direction was this taken?

A. That was taken from the river side, looking down the drain ditch.

Q. So the stop gate that is really regulated is the second one away from the river, is it?

(Testimony of W. A. Griffing.)

A. Yes.

Q. That was the one that was ultimately closed?

A. That is the one that was ultimately closed; not the first one.

Q. Now, have you got a picture of the Hanley "21" dam that illustrates your testimony as to its condition?

A. Yes, sir.

Q. (Witness here produces Photo No. 10.)

COURT: What do you mean by "21"?

A. That is in Section 21. That is the one where the board was.

Q. Which side of the river was the board in?

A. On the right-hand bank. It is on the left-hand side of the picture.

COURT: This is the one that had the four openings, and you found brush in the other three?

A. Yes.

* * * * *

Q. Did you also take a picture of the break in the bank or cutting in the bank that you have referred to, above the drain ditch?

A. Yes.

MR. TREADWELL: (Witness here produces No. 15, illustrating that cut.) Was that cut subsequently closed, Mr. Griffing, or not?

A. It was closed, but all the water was not shut off. The water was going around between the boards.

Q. Mr. Hanley states that he closed those cuts. When was that picture taken?

(Testimony of W. A. Griffing.)

A. It was taken on the 20th of April.

Q. That was the condition of the water running out at that time?

A. At that time, yes.

COURT: How much water was running out at that time?

A. About 50 second feet.

COURT: Was there that much water going through there at that time—50 second feet.

A. Yes, sir. That is not a measurement. That is as close as I could measure it by that measure.

COURT: That is a good sized stream of water, isn't it?

Q. Yes, you can see by the way it is running.

MR. WEBSTER: Which one is this?

A. That, I think, is about 1,000 feet above the drain ditch, and on the right bank of the river, as you look down the river, on the east bank of the river.

MR. WOOD: That would be the left bank?

A. No, the right bank, as you go down. That is on the west bank of the river, I should have said.

MR. WOOD: It is on the right bank as you *do* down. That would be the west bank?

A. The west bank of the river, yes.

Q. I want to be sure we get these right. The one you have referred to now as a break 900 feet below the drain ditch.

A. Below the drain ditch. I have no picture of that.

(Testimony of W. A. Griffing.)

Q. Isn't that the one that had the largest amount of water in it? I am not sure.

A. Yes, it had about the same, as nearly as I could get it at that time. The measurement of the one below the drain ditch was taken before this one.

Q. But you have no picture of that?

A. I have no picture of that.

MR. WEBSTER: That was in 35, wasn't it?

A. That is Section 27, I think. That would be in Section 27.

COURT: How much water was going out of that?

A. Fifty second feet.

COURT: As much as the other of which you have a picture?

A. Yes.

MR. WOOD: I didn't understand which side of the river was the break below the drain ditch in 27, the east or west side?

A. On the east side of the river, in Section 27, below the drain ditch.

MR. WEBSTER: And the other is above the drain ditch?

A. On the west side of the river.

MR. WOOD: All your testimony relates to the east fork.

A. To the east fork of the Silvies river, yes.

* * * * *

Q. You know the old bridge that is referred to?

(Testimony of W. A. Griffing.)

A. Yes.

Q. Did you take a picture of that old bridge?

A. I took a picture of that also, yes, sir.

Witness here produces Photo No. 18.

Q. I will ask you when you took that.

A. That picture was taken April 20th.

Q. Will you describe, for the Court, the condition of that bridge?

A. There are the old stringers of a bridge still left in the river, some of them below the surface of the water, holding up a quantity of tules and portions of boards. It acted as a dam, to a certain extent.

Q. Did you also take a picture immediately above that, showing the effect it had on the diversion of the water?

A. Yes.

Q. Will you produce that, Photo No. 19? (Witness does so.) Does that correctly show?

A. That shows one of numerous small cuts just above the bridge. I didn't get but one picture.

Q. Have you got another picture there, No. 20, of a cut in the channel or bank, or what is that?

A. Yes, I have another cut, on the east bank of the river, very close to the southeast corner of Section 27. It would be right in here (referring to map.)

Q. But it is on the east side?

A. It is on the east bank of the river.

Q. Does this show the water in the foreground—is the river, is it not?

(Testimony of W. A. Griffing.)

A. The water in the foreground is the river.

Q. The cut in the bank is the one that goes off to the right-hand side of the picture?

A. Off to the right-hand side of the picture, yes. There were some stakes and boards driven down in there. The water was going through them and around them.

Q. Did you testify specifically about the quantity of water that was going out?

A. About $5\frac{1}{2}$ second feet of water at the time.

MR. WEBSTER: Where was that you are telling about now? Is that in 27, or down in 35?

A. That is very close to the corner of 27 and 35.

MR. WEBSTER: Right there by the Orphan headgate?

A. Yes, just above the Orphan headgate a ways.

Q. Did you take a picture of another break below the Orphan headgate?

A. There is a ditch below the Orphan headgate that I have a picture of showing the water.

Q. About where was that located? Do you know where that was taken, Mr. Griffing?

A. That is about half a mile down the river, on the east bank, and in Section 35.

Q. Section 35?

A. Yes.

Q. It takes water to the east of the river?

A. Yes, in Section 35.

Q. This is a picture of it?

A. This is a picture of it. There were about $5\frac{1}{2}$

(Testimony of W. A. Griffing.)

or 6 second feet of water flowing through it at that time.

MR. WEBSTER: At what time?

A. That was April 20th.

Q. Now, Mr. Griffing, there has been referred to here a ditch belonging to the Pacific Live Stock Company, known as the Orphan ditch and headgate. You know the location of that?

A. Yes, I know the location of that.

Q. Would you state to the Court where it is located, substantially?

A. The headgate takes out of the river in the northeast quarter of Section 34—the northeast corner of the quarter.

Q. Does the company have any dam in the river at all?

A. No dam in the river whatsoever.

Q. There is a headgate?

A. Headgate taken out.

Q. Which direction does the ditch run then?

A. Flows westerly.

Q. Due west the first part of it?

A. The first part of it goes northwesterly for a short distance, then due west till it gets into Section 33; then it runs southwesterly then.

Q. So, as I understand it—to get it in the record—it runs from the river diagonally to near the north line of Section 34—is that correct?

A. That is correct.

(Testimony of W. A. Griffing.)

Q. Then runs along the north line of 34 into 33?

A. Into Section 33, yes.

COURT: Who owns Section 33?

MR. TREADWELL: The Pacific Live Stock Company.

Q. Then it goes through Section 33?

A. Yes.

Q. Is there also a branch of it running through Section 34?

A. There is a branch running through Section 34.

Q. Now, which side of that ditch, as it goes along the north line of 33 and 34, is the bank of the ditch?

A. On the south side of the ditch.

Q. That would be, as it is generally known, the lower side of the ditch.

A. The lower side of the ditch, yes.

Q. The way the country is formed there, Mr. Griffing, is it possible for any water diverted from the head of that ditch to flow out, and over any of the land of Mr. Hanley, in Section 37?

A. No.

Q. Nor there was no water being diverted by Mr. Hanley onto his Section 27. Did you open that ditch to show its capacity?

A. Yes.

Q. Did any of that water overflow up onto the hill?

A. No, sir, it couldn't do it. This was large enough to contain all the water that could possibly be taken from the Orphan headgate.

(Testimony of W. A. Griffing.)

Q. Before that time, and while the water was being diverted out onto Section 27, onto the Hanley land, will you state what was the relative amount of water diverted by the Pacific Livestock Company in at the head of that ditch, and the amount that flowed in it from Mr. Hanley's land, down near the southwest corner of Section 27?

A. There was about 17 cubic feet per second, flowing through the Orphan headgate, and after the water from Section 27 came into the ditch, the ditch was carrying 90 second feet of water.

Q. That was picked up, then, from the flow that came over Section 27, from the various points that you have mentioned?

A. Yes.

Q. What is the greatest amount of water that you were able to force through the Orphan ditch when you opened it wide?

A. 28 second feet.

Q. Now, have you got a picture of the Orphan headgate?

A. Yes.

Q. Will you produce it? (No. 22 is produced by witness.)

A. That is the intake from the river side.

Q. That is a picture of the intake from the river side?

A. Yes.

Q. Did you also take a picture of the Hanley field, or two pictures of it during the time the river was overflowing?

(Testimony of W. A. Griffing.)

A. Yes.

Q. One picture?

A. One picture.

Q. At the time the river was coming out onto Section 27 and coming down toward the Orphan ditch?

A. Yes.

Q. Does this correctly show Mr. Hanley's Section 27, and the water on it?

A. It does—a very good picture of it.

Q. That is all water, is it?

A. Yes.

Q. About how deep was the water on Section 27 during that period?

A. I should judge as deep as I got into it, about a foot and a half the deepest—over my boots.

COURT: That is ——

A. Directly north of the Orphan ditch.

COURT: Does that extend west into Section 28? I mean this water?

A. Well, some very little of it, very little of it then at that time.

Q. That was taken on April 20th, was it?

A. It was taken on April 20th.

Q. After that did Mr. Hanley shut up the cuts that were taking the water onto Section 27?

A. Yes, practically all of them.

Q. After he had done that, and the water had drained off, did you then open the Orphan ditch to its full capacity?

A. I did.

(Testimony of W. A. Griffing.)

Q. Did you take a picture of the Orphan ditch?

A. Yes.

Q. This picture produced is No. 24. Which side of the ditch was that land on?

A. That would be on the north side of the ditch.

Q. The land that is shown there north of the ditch?

A. North of the ditch in Section 27.

Q. So the land that is here shown is the Hanley land?

A. Yes.

Q. This shows the water flowing?

A. Except in the immediate foreground, as taken, in the corner. That shows a little corner that belongs to the Pacific Live Stock Company; the balance is William Hanley's.

Q. This shows water in the ditch?

A. Yes.

Q. None of that flowed onto the Hanley land?

A. Not a particle of it.

Q. Did you also take a separate picture of Hanley's land while the ditch was running full capacity?

A. That is the only picture I took of it. That shows the land when the ditch was running to its capacity."

* * * * *

"Q. About what would you say was the average amount diverted by the Pacific Live Stock Company through the Orphan ditch during the months of March and April, that you have testified to, on an average, at the head?

(Testimony of W. A. Griffing.)

A. It wouldn't average at most over 17 or 18 second feet.

Q. Now, beside the obstructions that you have mentioned, were there any other obstructions in the river on the Hanley property, that you found there?

A. No. I don't remember any."

* * * * *

CROSS EXAMINATION.

"Q. Now, the water which flows over the bank—leaving for a moment, however, it gets over—in section 27 would naturally, if it was not for the Orphan Head-gate ditch, flow down over Section 34, wouldn't it?

A. Yes, most of it.

Q. And that is on the company's property, isn't it?

A. Yes.

Q. All of the water that flows over in Section 27 gets onto the company's property, doesn't it? Flows over the bank?

A. Well, the majority of it, yes.

Q. Well, what of it don't get over there?

A. Some of it would go onto Section 28.

Q. On Section 28?

A. Yes.

Q. Well, there would be mighty little of it.

A. Yes, very little of it.

Q. And all of the water that would flow over the west side in 27, would run right into the Orphan Head-gate ditch, wouldn't it?

(Testimony of W. A. Griffing.)

A. Yes.

Q. And would all be carried off by that ditch, wouldn't it, on the company's property?

A. Yes, if the ditch was large enough to carry all of it.

Q. Yes, if the ditch was large enough to carry it. I take it for granted, of course, it would carry it. That I don't think it is necessary to mention. But you were putting water through the Orphan Headgate at a time when there was sufficient water overflowing the bank on 27 to fill the ditch, weren't you?

A. Not all the time. The headgate was closed part of the time.

Q. Well, part of the time?

A. Part of the time, yes.

Q. Grant that it is true that the water in flowing in the Orphan Headgate ditch from the river would not overflow Section 27, yet the water overflowing Section 27 would be held back by water which you put into the ditch, wouldn't it, and would not be taken off. In other words, if you hadn't put any water in your ditch from the river in the Orphan Headgate ditch, it would have carried off the water on 27, to the extent of its capacity?

A. To the extent of the ditch's capacity, yes.

Q. If there was enough water coming from 27, from the bank of the river, to fill the Orphan Headgate ditch, there would not be any necessity for bringing any in from the river, would there?

A. Not if the ditch was carrying all it would hold.

(Testimony of W. A. Griffing.)

Q. And you say that there were times when the ditch would not carry the water that came over 27?

A. Yes.

Q. And at the same time, there was water coming through the Orphan Headgate, wasn't there?

A. At times, yes.

Q. Well, this water that came over—I speak of the west side of 27, of course—the water that came over there, all of it went right down on the company—all except a little that might have gone on 28?

A. I didn't follow it all the way down, but it immediately went into the Orphan ditch, yes.

Q. Well, then, you don't mean to say, or to convey the impression that water which overflowed the banks on 27 was lost to the company, do you?

A. Well, I don't know whether all of it was, or not, because I didn't follow it down to see where all of it was going.

Q. Well, it answered the same purpose, so far as the effect was concerned, as the water that came from the Orphan Headgate ditch, didn't it?

A. A certain amount of it, yes.

Q. All of it that the Orphan Headgate would carry?

A. Yes."

* * * * *

"Q. I want to ask you a little more about the drain ditch there. You say that ditch was open?

A. Water was pouring over the stop gate in it, yes.

(Testimony of W. A. Griffing.)

Q. Well, which stop gate? You don't refer to the one down right close to the river there, where the bridge is—you don't refer to that as the stop gate, do you?

A. There is no bridge across the drain ditch at the edge of the river.

Q. Isn't there?

A. No.

Q. Well, they have taken it away, then? You know there are some boards there?

A. Yes, there are some old boards there.

Q. You don't mean that as the stop gate?

A. No, it is below that.

Q. You mean below that? It is a substantial structure, isn't it?

A. Yes, sir.

Q. A good substantial structure for a stop gate in the ditch, isn't it?

A. Yes.

Q. Even if Hanley did build it, it is all right, isn't it?

A. It has the appearance of being good.

Q. You say the water was pouring over the boards in it?

A. Yes.

Q. Were all the boards in?

A. No, there were boards on the bank.

Q. What?

A. There were boards that were out lying on the bank.

(Testimony of W. A. Griffing.)

Q. It is constructed substantially like all the other dams there—frame work with movable boards?

A. Yes.

Q. They are all—the company and everybody else builds on the same general plan, don't they?

A. Apparently, yes.

Q. There were how many boards out of it at the top?

A. I don't know.

Q. Did you go there?

A. I was right there. That was laying on the top of the ground?

Q. No, I don't care how many were on top of the ground. How many more would it have taken to put in to complete the dam?

A. Well, at least two boards. That would be four boards, two on a side. There are two openings.

Q. And it would take two more boards put in there to make it complete?

A. To make it tight, yes. At least that many.

Q. What is the width of those boards?

A. I believe they are six inch boards—two by six.

Q. So it required 12 inches more?

A. Yes, at least that, because the water would back up.

Q. And the water was pouring over there?

A. Yes.

Q. Was there water down on 35 at that time, below the drain ditch and in 27?

A. Yes, some.

(Testimony of W. A. Griffing.)

Q. Overflowing the banks there, wasn't it, covering a good deal of 35 and part of 24, east of the river?

A. Yes, water was overflowing the banks there.

Q. And did you take a photograph of that—I have forgotten. I guess you did.

A. Yes, a photograph of the headgate.

Q. How long did that remain in that condition?

A. Water pouring over the boards in the drain ditch?

Q. Yes.

A. Well, the only dates I have on it was from the 3rd until the 8th.

Q. The 3rd till the 8th of April?

A. Yes. But it was running over there before, but I hadn't taken the measurement before that.

Q. But after the 8th it was closed?

A. Some time between the 8th and the 12th I was there again, and it was closed. I was there on the 12th.

Q. These two additional boards had been put in, and that shut it all off?

A. Yes.

Q. You were, of course, in making all these observations, doing all of this work for the Pacific Live Stock Company, for which you were employed?

A. Yes.

Q. And in their service, and in their interest, you went and made these various observations and measurements, and then took the photographs and all having been done for that purpose?

A. Yes.

(Testimony of W. A. Griffing.)

COURT: Would water going down the drain ditch benefit Mr. Hanley?

A. Why, I think so, greatly, yes.

COURT: In what way?

A. Getting the water spread out over those sections of the country it irrigated.

COURT: Does the water spread out as it comes out the drain ditch, or does it pass off?

A. It will spread out over the land.

Q. Do you mean to say the water from this drain ditch, after it gets into the drain ditch, spreads out over Mr. Hanley's land?

A. It was apparently doing so at that time.

Q. Where was the water running out from the drain ditch below the headgate at the time you speak about?

A. I didn't follow it down. There was too much water there.

Q. Do you know, as a matter of fact, that there was a solitary inch of water going out of that drain ditch over Hanley's properties at that time?

A. No, I do not.

Q. Well, if you made any observations of that drain ditch down there, don't you know as a fact that there was no water going out of that drain ditch over Mr. Hanley's property?

A. No, I don't know that either.

Q. Well, you didn't make much of an observation of it, then, did you?

(Testimony of W. A. Griffing.)

A. Not at the lower end, no.

Q. Well, you don't mean to tell me that the water flowing over that headgate that would go through there by reason of the absence of these two six-inch boards, would anywhere near fill the drain ditch, would it?

A. I don't know the capacity of the drain ditch.

Q. Did you look at it and see?

A. It had the drain ditch filled, yes. Immediately below the headgate, the drain ditch was full.

Q. But it was not running over?

COURT: The Bank?

MR. WEBSTER: Yes.

Q. How far down did you examine?

A. Not over a quarter of a mile.

Q. Did you ever follow that drain ditch on down?

A. No, there was water in there at that time, and I could not follow it down.

Q. Do you know whose property the drain ditch goes onto, after it leaves Mr. Hanley's property?

A. No, I do not; not all of them.

Q. Well, do you know anybody's that it goes on? Whose does it go on immediately after it leaves Mr. Hanley's?

A. I don't know.

Q. You don't know that it goes directly from Hanley's property onto the property of the Pacific Live Stock Company, then?

A. No, I do not.

Q. And delivers every drop of water that runs

(Testimony of W. A. Griffing.)

into it onto the Pacific Live Stock Company's properties. You don't know that?

A. No.

Q. And never does deliver a drop of water out of that ditch onto Hanley's properties? You don't know that either, do you?

A. I do not, no.

Q. Ever since that it has been closed up?

A. So far as I know, yes.

Q. Well, you have been along there a good deal, haven't you?

A. Every few days, yes.

MR. TREADWELL: He Doesn't know what has been done since he left there.

MR. WEBSTER: Of course. I naturally am trying to apply a little common sense to this.

Q. Now, you say, referring again for a minute to the Orphan headgate, that there is no dam in the river there at all?

A. Immediately below it?

Q. Yes.

A. No, not that I know of.

Q. What is the width of that headgate—the width of that in the clear, inside?

A. 7.6 feet.

Q. And it is cut right into the bank of the river, isn't it?

A. The headgate is right in the bank of the river, yes.

(Testimony of W. A. Griffing.)

Q. And the lower part of the headgate is on a level with the bottom of the river at that point?

A. No.

Q. Almost, isn't it?

A. No, I think not.

Q. What is the difference?

A. I couldn't say. I have not measured it. I can say it is at least $2\frac{1}{2}$ feet above the bottom of the river.

Q. You say that the bottom of that headgate—the bottom of the Orphan headgate ditch is at least $2\frac{1}{2}$ feet above the bottom of the river at that point, do you?

A. I have not made any specific examination of that, but that is my recollection of it, from taking soundings there.

Q. Well, you said that it was as your best recollection?

A. As my best recollection, yes.

Q. From all the observations you have made?

A. Yes, from any observation I made there.

Q. At least $2\frac{1}{2}$ feet?

A. I think so.

Q. Along there, the bank of the river is higher than the country adjacent to it, isn't it?

A. Yes.

Q. It is built up a little bank on each side?

A. Yes.

Q. So that when there is any depression in the bank, or stock going over it that knocks it down, why, the water will run out when the river gets up—run out at these places?

(Testimony of W. A. Griffing.)

A. Yes.

Q. That is a fact, isn't it?

A. That is a fact.

Q. Do you know what the fall of the river is along about where this Orphan headgate is?

A. No.

Q. You observed it there—observed it carefully, I suppose, have you, to some extent?

A. Yes.

Q. Don't you know, as a matter of fact, that there is practically no fall there?

A. I don't know, because I haven't—how do I know?

Q. Well, looking at it, can't you tell that there is practically no fall from the north line of 34 down past the Orphan headgate, for quite a distance?

A. Well, the stream is sluggish.

Q. What do you say the average of the flow through the Orphan headgate is?

A. That is this season?

MR. TREADWELL: Yes.

A. From the measurements I have taken, the average has been between 16 and 17 second feet.

COURT: What is the capacity?

A. The capacity, as far as I have measured, about 27 or 28 second feet.

MR. TREADWELL: In the ditch, you mean?

A. Yes, in the ditch, the Orphan ditch.

Q. That is not the capacity of the ditch, however?

(Testimony of W. A. Griffing.)

A. No, that is not the capacity of the ditch.

Q. But it is all the water that has been taken out of the river into the ditch?

A. Yes.

Q. The highest flow you have had is 28 second feet?

A. Yes.

Q. You have a measuring gate in the headgate?

A. Yes.

Q. How deep does the water have to be there, in order to make 28 second feet?

A. The depth that that gate would register would depend upon the water that is coming across Section 27.

A. No, I speak of the water that is coming from the river.

A. Into the headgate?

Q. Yes.

A. The gauge would register eight-tenths with 27 second feet of water.

Q. Eight-tenths of a foot?

A. Providing there was no back water from Section 27. When the water is backed up into the ditch from Section 27, it will register about two feet.

Q. Depending upon how far it is backed up?

A. Yes, depending on how far the water is held up on Section 27.

Q. Does it make that much difference with the flow of the water through the headgate?

A. Difference in what way?

Q. Makes so much difference in the quantity of water going through on these measurements?

(Testimony of W. A. Griffing.)

A. There would be the same amount of water, but the gauge would register differently.

Q. You don't understand me, I guess. In order for 28 second feet of water to go through the Orphan headgate, what must be the depth of the water as it flows through the headgate?

A. About eight-tenths—six to eight-tenths of a foot.

Q. About eight-tenths of a foot?

A. Yes.

Q. Will give 28 second feet?

A. Yes.

Q. Provided, I gather from what you say, provided the ditch is free for the flow of that water?

A. That is right.

Q. But when the water comes over in Section 27, and flows down into the Orphan headgate ditch, that creates a back current which requires a depth of how much, you say?

A. Two feet.

Q. Two feet; in order to make 28 second feet coming through the ditch?

A. Yes.

A. That ditch is pretty near level along there, too, isn't it? Very slight fall; do you know what the fall is?

A. No, I do not.

Q. You didn't take any of those levels there at all?

A. No.

Q. And none of the men under your employment have taken any?

(Testimony of W. A. Griffing.)

A. Not this year, no; not that I know of. No, in fact I know they have not.

Q. The men that would make those measurements are under your employment?

A. Yes.

COURT: Does that same condition prevail at the headgate of the drain ditch, as to the territory being level, and the water flowing very sluggishly?

A. No, because conditions there are different than they are at the Orphan ditch. The water is pouring over the boards in the drain ditch, while at the Orphan ditch it is not.

COURT: I say, is the territory level, generally?

A. I think it is practically the same through there, yes.

Q. I want to ask you about this brush, up at 21 dam. You say there was one board in the dam across one of those openings?

A. Yes.

Q. Was that board nailed in there, do you know?

A. Not that I know of.

Q. It was at the bottom?

A. At the bottom, yes.

Q. How wide is that, do you know?

A. I don't know what the width of it is. I should judge about six-inch board—two by six. I think that is what those flash boards are.

Q. Now, what is the width of the opening? There are how many do you say—four?

(Testimony of W. A. Griffing.)

A. There are four openings.

Q. What is the width of the openings, do you know?

A. I don't know.

Q. You didn't measure them?

A. I did not.

Q. Give us your estimate.

A. Between three and a half and four feet. That is, roughly.

Q. This board was the width of one of those openings?

A. Yes, just the width of one of the openings.

Q. What about the brush that you say was there?

A. In what respect?

Q. Well, tell us about it. You answered yes and no to questions Mr. Treadwell asked you, but tell us about it now, what it was.

A. There was quite a quantity of brush holding that water.

Q. What do you mean by quite a quantity? Give us a little better idea than that.

A. I didn't count how many pieces, but there was enough of brush lodged against the dam to raise the water one foot; that is, the water was one foot higher above the dam, than it was immediately below, in a difference of three feet.

Q. Well, the general structure of that dam raises the water, don't it?

A. No. I have seen the water when it was running through there lately, when there were no obstructions,

((Testimony of W. A. Griffing.)

that there was no apparent raising in the water above and below.

Q. Did you measure the water above? Whereabouts below did you measure it below where it comes off the boards?

A. No, while they were still in the headgate.

Q. Measured the water in the headgate?

A. Yes.

Q. What was the difference in measurement between that and above, do you say?

A. One foot when the brush was in—nine-tenths of a foot to one foot.

Q. From nine-tenths of a foot to one foot?

A. Yes.

Q. How many times did you see the brush in there?

A. Oh, seven or eight times, if not more.

Q. When did you first see it?

A. In the first part of April.

Q. Early in April?

A. Yes.

Q. Was it all there then, just the same as it was at the last time, or did it accumulate?

A. Well, it was about the same then as it was up to the time it was taken out.

Q. When did you see it the last time?

A. After the middle of April. The exact date, I could not say off-hand.

Q. Well, you didn't take any memorandum? When did you take this photograph?

A. I think that photograph was taken April 8th,

(Testimony of W. A. Griffing.)

wasn't it? I wouldn't say for sure without looking at it.

Q. Was it after I came out there?

A. I took the photograph?

Q. No, that you saw it for the last time?

A. It was after you came out there.

MR. TREADWELL: April 8th this one was taken.

A. Yes, April 8th. That is as I remember it.

Q. Did you see it after I was down there? Do you remember that day I was down there? You were there, weren't you, down below on the ditch?

A. No, sir.

Q. Some of your men were?

A. Yes.

Q. You know when I was down there?

A. Yes.

Q. Was it after that?

A. That was on April 20th.

Q. Was it?

A. No, it was just before that.

Q. You got the date?

A. Yes.

Q. Was it after that you saw it the last time?

A. No, it was before that.

Q. How long before?

A. A day or so, I think.

Q. When did you go there and find that it was out?

Now, I was there on the 20th, you say? That is your memorandum your men made. And how soon after the

(Testimony of W. A. Griffing.)

20th was it that you saw it taken out, or rather, not saw it taken out, but that you saw that it was out?

A. It was around the 24th.

Q. Anyhow, the next time you went there it was out?

A. Yes, the next time I went there. I think it was the next time.

Q. What do you say about there being old broken, dead brush, some of it?

A. Some of it.

Q. What was the other?

A. Willows that apparently had the appearance of being cut; that is, showed the effects.

Q. How many of those willows were there that appeared to have been cut?

A. There were three good-sized limbs in there.

Q. They all seemed to have drifted down there, did they?

A. I don't know how they got there.

Q. No, of course you don't know how they got there. I appreciate that. But did they have the appearance as though they had been deliberately laid in there as a dam, or as if it had merely drifted down the stream?

A. Well, they were not laid in there symmetrically, no.

Q. Did you see any above there, or around there, where any willows had been cut?

A. I didn't look.

Q. You didn't look for that?

A. No.

(Testimony of W. A. Griffing.)

Q. You say apparently had been cut. Is that the way you put it?

A. They had the marks of a hatchet on them, where you would strike a limb diagonally, and cut it the way they are generally cut.

Q. But you didn't see any place where they had been cut?

A. I didn't see anybody cut them.

Q. No, nor you didn't see any place from which they had been taken?

A. No.

Q. Did it seem to be old, or was it new green ones?

A. New.

Q. New cut. Did you see the cut willows in there the first time when you saw the dead brush, or did they come there afterwards?

A. Well, I couldn't say whether they were there the first time, or not.

Q. Now, that would raise the water, you say, about a foot—from eight-tenths to a foot?

A. From nine-tenths to about a foot, yes.

Q. Was Mr. Hanley making any use of that water at all?

A. Yes.

Q. What use?

A. Going into his 21 ditch.

Q. Well, from there where?

A. Well a portion of it was being used on 22. Where the rest of it was being used, I don't know.

(Testimony of W. A. Griffing.)

Q. Was there a ditch on the west side that you noticed?

A. The west side of the river?

Q. Yes.

A. Yes.

Q. Was there any water going into that?

A. No.

Q. Isn't it a fact that that ditch on the west side of the river was stopped up by a dam?

A. Yes.

Q. Isn't it also a fact that if that dam had been taken out, and the level of the river reduced, this eight-tenths of an foot, or one foot, or whatever it is, that the water would have run into that ditch on that side, and he could have taken out a whole lot of water there? Isn't that a fact?

A. I didn't make any observations of that, but I believe it would have run into the ditch.

Q. So that if he had taken that out and taken all the brush out, and everything of that sort, there would have been more water going down through there than there was the way it was?

A. Down through where?

Q. Down through the west side and the east side, too; or rather, the west side.

A. Why, apparently, yes. There would be more water flowing on down the river."

* * * * *

"Q. Mr. Griffing, have you stated in your direct examination all the cases of diversion of water from both

(Testimony of W. A. Griffing.)

the east and the west forks of the river that you observed?

A. I believe so, yes.

Q. When did you first commence making your observations?

A. About the middle of March.

Q. The middle of March?

A. Yes.

Q. That was the first time you went out there?

A. That was the first time.

Q. You are not a resident of Harney County?

A. No.

Q. Where are you from?

A. San Francisco.

Q. They spoke of — somebody did — your having men working for you. Did you have any subordinates?

A. Yes.

Q. What were their duties?

A. Measuring water and running different lines, surveying.

Q. Surveying what?

A. Different fields and lands owned by the Pacific Live Stock Company.

Q. You were not engaged entirely, then, in making just these observations on Hanley's land?

A. No."

* * * * *

"Q. Now, you said in reference to this Luig dam in 31, that all of the west fork was going out except about four second feet, if I remember rightly?

(Testimony of W. A. Griffing.)

A. Yes.

Q. And it was going all over Section 6. I don't know whether you meant that to be just the loose, general language, or whether you meant it to be exact, that all of Section 6 was irrigated by that water.

A. No not all of Section 6, would have been irrigated by it, possibly. I didn't follow all the water down to see exactly where all the water was going.

Q. Do you know whether Section 31 was also being irrigated from it?

A. A portion of it, yes.

Q. How much?

A. Well, I couldn't say how many acres.

Q. Well, I meant approximately, by the subdivisions of the section, or did you investigate that?

A. Yes, there was a portion of the south half of Section 31.

Q. I will ask you this: Did you more particularly confine your accurate observations to the amount of water being diverted than to seeing where it went?

A. Yes, more particularly.

Q. Now, in relation to this new bridge, the stringers of which you say obstructed the flow of the river, what section was that in?

A. Section 27.

Q. And how far above the old bridge?

A. Not very far. I didn't make any measurement there, but it was a little ways above the old bridge.

Q. About what is the width of the river there? Where the bridge is?

(Testimony of W. A. Griffing.)

A. I should judge about 14 to 16 feet—14 feet to 16.

Q. And, as usual, the banks of the river are a little higher than the surrounding country, aren't they?

A. Yes.

Q. The country is pretty level?

A. Apparently.

Q. How much of the stringers were in the flow of the river?

A. All of them, all the stringers.

Q. Was the bridge itself covered?

A. No, some of the boards were floating.

Q. But it was passable as a bridge? The bridge itself as a bridge was not submerged?

A. No.

Q. What time of this year was that?

A. It was, I think, about the 8th—between the 1st and 8th of April.

COURT: Were those stringers in the new bridge set in lower than the stringers in the old bridge? That is, down into the stream?

A. They were submerged more, yes.

COURT: Well, I mean, taking a level?

A. Well, I don't know. I didn't take a level on it.

COURT: You didn't take a level?

A. No, but they were under the water, while the stringers in the old bridge were not entirely submerged.

COURT: Were they partially submerged?

(Testimony of W. A. Griffing.)

A. Partially submerged, the stringers in the old bridge.

Q. How much water was the new bridge throwing out over the bank of the river?

A. Well, it would have been impossible to take a measurement of it exactly. It was running out. It was running out in numerous small cuts or breaks.

Q. Just give your guess.

A. I couldn't make a guess.

Q. Did you observe where that water was going after it got out of the channel?

A. Yes.

Q. Where was it going?

A. It was going across Section 27, and from thence into the Orphan ditch.

Q. So finally, it got onto the company's property.

A. It went into the Orphan ditch, yes.

Q. Well, I don't know whether the court is familiar with the Orphan ditch. Do you mean it finally got onto the company's property?

A. I didn't follow it down after it left Section 3.

Q. Everything that gets into the Orphan ditch really gets on the company's property? That is what it is for, isn't it?

A. Yes, it is what the ditch is for."

* * * * *

"When did you first go to the Hanley ranch? That is the ranch of the William Hanley Company?

A. Along the latter part of March.

(Testimony of W. A. Griffing.)

Q. And you went there and asked leave to go on the property and make observations and measurements, didn't you?

A. Yes.

Q. What did you say was your purpose in making these observations and measurements?

A. Determining the duty of the flood water.

Q. To see how much water it required to water a particular area?

A. Yes.

Q. Wasn't that the statement you made?

A. Yes, that was it.

Q. You didn't make any statement about these particular points of observation?

A. No.

Q. Nor about your purpose to collect testimony?

A. No, I did not.

Q. But that was your intent?

A. Not at that time, it was not, no.

Q. When did it become your intent?

A. Some time the first part of April.

Q. And under instructions?

A. Yes.

Q. Under instructions from whom?

A. Mr. Treadwell—Mr. Gilchrist.

Q. Given orally or in writing?

A. Orally.

Q. Well, after you got those instructions, you naturally went on the Hanley property, to make these very observations, didn't you?

(Testimony of W. A. Griffing.)

A. Yes, at times.

Q. You were always welcome there, weren't you?

A. Yes, as far as I know.

Q. Now, did you at any time, say anything to Hanley or his superintendent, or anybody, about these difficulties and objections to the flow of the river, as you found them?

A. I told Mr. Hanley that I could not get accurate measurements so as to determine the amount of water necessary to irrigate a certain portion of land, owing to the fact that the water was running out of numerous cuts; that I could not get measurements of.

Q. Yes. What did he say?

A. I believe he said it would be rather hard to get accurate measurements.

Q. Well, what I am trying to get into the record, is whether you, as representing this company for whom you are working, went to Mr. Hanley and said: "Here are diversions of water, and here is wastage of water, and it ought to be stopped"?

A. No, I did not.

Q. And naturally you got no refusal from him? Now, about these cuts. You have called them cuts. What is your reason for believing that they are artificially made, or purposely made?

A. I believe I said they were either cuts or breaks, but there was evidence of shovel work in pretty nearly all of them.

Q. And you spoke about a lot of little ones. Did they all have shovel work?

(Testimony of W. A. Griffing.)

A. Not that you could notice.

Q. Which ones showed evidence of design — shovel work?

A. The largest ones.

Q. What?

A. Just the larger ones.

Q. I know, but I want to know how many there were, and where there were, that showed these.

A. The one on the east bank of the river, below the Hanley drain ditch, also the one on the left bank above the drain ditch, another one above the Orphan headgate, about in the northeast corner of Section 27, and the one below the Orphan headgate in Section 35.

Q. Well, just describe what you mean by the marks on the shovel. Were they excavations made and dirt carried from a distance?

A. No.

Q. Did you see those shovel marks at a distance, or see them in the cut itself?

A. Right at the banks of the cut, on each side of it.

Q. Did they seem recent?

A. Some of them, yes, had been recent.

Q. Now, the banks of this river, as has already been said, are higher than the surrounding country, and in the flood time, the river overflows its banks, and pours down onto the lower levels surrounding it, and as a matter of fact, this entire river bank is wavy, or indented with numerous depressions, isn't it?

A. Yes, to a certain extent, it is.

Q. So that, as the river gets up, it flows out over

(Testimony of W. A. Griffing.)

its banks, first in these various channels, or outlets in the bank, and they wear, don't they?

A. No, I don't think they would wear in the meadow sod. It requires a whole lot of current before it will wear.

Q. You didn't see anybody at work?

A. No, I never have seen anybody working there.

Q. Coming back to the brush in 21, dam in 21, I understand your answer is general, that you didn't call anybody's attention to any of these things, or make any complaint, but I would like to know specifically about that.

A. I didn't call anybody's attention to it at all, because I didn't know the conditions of the decree at that time.

Q. Well, I am just asking whether these people were warned? Now, the board which you speak of was just across one of the section openings, and that would really mean one-fourth of the dam?

A. Yes.

Q. On which side of the river, in relation to this board, was the set of the current, or the flow? Was it on the same side with the board or on the opposite side?

A. It was on the opposite side at that time.

Q. And this board, I thought the way that they finally got it into the record was a little bit obscure about dimensions, so I am going to state it as I understand it—this board would be about four feet in length, and six feet in perpendicular width.

A. No, about six inches.

(Testimony of W. A. Griffing.)

Q. Six inches, I should say, yes. That is right, is it?

A. Yes, that is approximately right."

* * * * *

REDIRECT EXAMINATION.

"Q. Now, did you mention those cuts to Mr. McLaren, the foreman of Mr. Hanley?

A. I did, yes.

Q. What did Mr. McLaren say those cuts were?

A. I was asking Mr. McLaren when I first went there, so as to get a line up, so as I could measure the water, and he said there were numerous cuts they used, he didn't say numerous—he said there were cuts in the bank of the river that formed part of their irrigation system that it would be hard to get any measurements of.

Q. When you went up there from San Francisco, you were employed, were you not, Mr. Griffing, for the purpose of collecting the necessary data to prove the duty of water, or the amount of water necessary to irrigate land in that valley, in adjudication proceedings?

A. Yes, sir.

Q. You were not given any instructions to get any evidence against Mr. Hanley, in regard to this decree in any way, were you?

A. No, sir, not in any way at all.

Q. It was not until later, when Mr. Gilchrist and I got on the ground, and found the conditions, that we asked you to get additional data?

A. Not until then.

(Testimony of W. A. Griffing.)

Q. But in the meantime, you had been measuring the entire river, in connection with the question of how the water was used, and where it was used, and therefore, how much it took to produce the results.

A. To produce the results, yes.

Q. So you had lots of this data before that time?

A. Yes.

Q. What you told Mr. Hanley was the absolute truth when you told him?

A. Absolutely, in every respect, yes.

Q. Now, Mr. Griffing, you have stated in your direct examination the time you forced all the water you could into the Orphan ditch, and got, I think about 27 second feet in there. How high was the river at that time at the Orphan ditch?

A. About—it was bank full, just at the top of the banks.

Q. So that was the full amount that could be taken into the head of that ditch, when the river was within its banks?

A. Yes, sir.

Q. There was one thing that might be a little obscure if it was not explained. You stated that at that time, when you got all the water into the Orphan ditch that you could get in, the water only stood on your gauge in the ditch, I believe, less than a foot in height?

A. Yes, about eight-tenths of a foot.

Q. Will you explain why that is, and how the ditch is constructed that causes that to that extent.

A. There is a grade to the floor of the headgate,

(Testimony of Edward F. Treadwell.)

evidently and it being narrow, it creates a very strong current, which lowers the water down; that is, providing there is no come-back water to less than a foot, about eight-tenths of a foot.

Q. And is there any overflow? That is, is there anything in the bottom of that gate that obstructs the flow at the flooring?

A. No, except the permanent board, that is in the front side, or the end of the headgate.

Q. That is what I want. So there is a permanent board in the front of the headgate?

A. Yes.

Q. So that the water from the river has to flow over that, and it is below that that you made this measurement?

A. Yes, it is below that that I made the measurement, yes.

MR. EDWARD F. TREADWELL,

One of the attorneys for the Pacific Live Stock Company, testified as follows:

DIRECT EXAMINATION:

Questions by Mr. Minor:

Mr. Treadwell, there was something said in Mr. Hanley's affidavit regarding the correspondence had between yourself and him, in regard to matters in Harney Valley.

(Testimony of Edward F. Treadwell.)

A. Yes, sir.

Q. Have you the original correspondence with you?

A. I haven't the original. I have copies of it.

Q. You have copies of it?

A. Yes, sir.

Q. I wish you would produce such copies as you have.

A. The first communication I had from Mr. Hanley was by memorandum that he left at my office—that is, he called at my office in the early part of March, when I was out, and I didn't see him, but he had a conversation with my secretary, and the secretary left me a memorandum of it, to the effect that Mr. Hanley wanted to suggest that if the Orphan ditch could be regulated with his bookkeeper, and our bookkeeper, who had just been sent into the country, rather than with the superintendent and foreman of our ranch, there would be no difficulty—they could get along nicely. I answered that by letter of March 4th, which read as follows: "Mr. W. B. Hanley, Burns, Oregon. Dear Mr. Hanley: I regret that I was absent from my office when you called, but I gather the general object was, owing to some uneasiness on your part in regard to the Orphan headgate. I certainly hope that that can be operated with due regards to your rights, and it seems to me that our representative in cooperation with your Mr. Sterling could do so without difficulty, and I am writing to the company to try and cooperate with you in every way so as to avoid any possible friction in this matter. I expect

(Testimony of Edward F. Treadwell.)

to be in Burns about April, and hope to see you at that time. Very truly yours, Edward F. Treadwell."

In reply I got this letter from Mr. Hanley:

"Burns, Oregon, March 20th, 1915.

Edward F. Treadwell, Esq.,

San Francisco.

Dear Mr. Treadwell:

I will not go into details regarding the Orphan headgate, as you seem to catch the drift of my mind that this has been litigated enough, and know there is no reason why this should not be operated to the satisfaction of both our companies, with the understanding that this is the wish of the principals that it should be, and should your Mr. Terry and our Mr. Sterling meet there would be no question as to operating it satisfactorily. I will await your arrival in Burns.

Yours very truly,

Wm. Hanley."

That is the only correspondence I have had with Mr. Hanley, and he didn't leave any message, or I didn't get any message from him at the time in regard to any other matter, except the Orphan ditch.

Q. When did you go to Burns after that?

A. I reached Burns on the 11th of April.

Q. While you were in Burns, did you have any further conversation, or communication with Mr. Hanley, regarding these matters?

A. I did. Mr. Hanley requested that I go out with

(Testimony of Edward F. Treadwell.)

him, onto his property, and he said that the Orphan ditch and the embankment along the side of it, was preventing the water from flowing off his land, and he wanted me to go out there and see it. I think Judge Webster also said something of the same nature, and I finally made an engagement with him for the Sunday—it would be the 18th of April. I went with him onto the ranch. He took me personally, and we went down to his house, and from the house went down the bank of the river, along through Section 17. I might as well go ahead and state just what I saw, I suppose.

Q. State what you saw.

A. As I went down, I saw the river flowing through 27 within the general banks of the river all the way down; but there were quite a number of places that had either loose earth or places where you could see that control of the water had been put in—that is, stakes and boards, and things of that kind,—so that at the wish of the parties, the water could either be let in or kept out. And the water was all over Section 27, coming directly from the river, and as we got down to the lower end of it, it was quite a sea of water.

COURT: Was that during high water?

A. There was no high water at that time at all. The water was very low in the river. The water was somewhere from a foot, possibly, to a foot and a half deep, on parts of the property. Mr. Hanley took me right through it without any question of any kind—took me right down through the property, taking me down to the Orphan headgate, to show me how we were inter-

(Testimony of Edward F. Treadwell.)

fering with his rights. He took me down to the Orphan headgate, and when we got there we looked at it, and the Orphan headgate was closed, and was not taking any water whatever. We then stood there on the bank, and Mr. Hanley told me his idea: That his land had always been overflowed in 27, and that that overflowed down onto our 34—I think it is—and that we had no right to put any ditch or bank along there, to prevent that from being done. I simply told Mr. Hanley that the matter had been litigated, that the court held we had a perfect right to build that ditch; that we didn't intend to leave our land a marsh for all time to come; that it was a marsh, and we couldn't cut hay there or hardly raise hay there, in its natural condition; that we intended to reclaim it, and that we had reclaimed it by this ditch, and also by this levee, and that we intended to maintain it there. Then I went on and told him if he would prevent the water, as he should, from coming over on his land, he would have no difficulty whatever. Mr. Hanley and I then got into the wagon again and rode back across the field, and I told him that I didn't care to discuss the matter of the Orphan headgate further. That we built it for the purpose that I had mentioned, and we were going to use it. "But," I said, "Mr. Hanley, I do want to talk to you, about what you are doing with the water of the east fork of the river." I says: "Not only are we getting no water whatever, but the people at Lone Willows are getting no water whatever from the river. You are taking all the water on both sides of the river." I told him that his 21 ditch was taking water, that his

(Testimony of Edward F. Treadwell.)

drain ditch had taken water, and that the water was all over his land, and that we were getting no water whatever. I then went on further and not only complained of that, but said to Mr. Hanley: "Besides this, Mr. Corcoran, the superintendent of the Water Division, who is taking the testimony in this adjudication proceeding, is coming down here to go over all of the property in this valley, including yours, and" I says: "We are contending in this case that there is not sufficient water to irrigate our lands," as there certainly admittedly is not this year,—everybody, I believe, admitted that. There was no dispute about it. Now, I says: "For Mr. Corcoran to come down here, and find such a waste of water as there is on your property, certainly will be a very bad piece of evidence against the people of this valley who are trying to protect their rights in it." We talked that over, traveling clear across this section, and as we got about half way across, there was a wagon on the other side, and I said: "I wouldn't be surprised, Mr. Hanley, if that was Mr. Corcoran over there at the present time." In fact, Mr. Corcoran had told me that morning that he was going down over the valley. He didn't tell me that he was going to Mr. Hanley's, and I wasn't sure whether he intended that morning to go to Mr. Hanley's. But I said: "I wouldn't be surprised if that was Mr. Corcoran over there." Mr. Hanley says: "No, that is probably some duck shooters." The wagon was then approaching, and they had a gun, and they were approaching this immense lake which was covered with ducks, or mud hens—I don't know them apart myself hardly—

(Testimony of Edward F. Treadwell.)

and I am not sure which they were. I think that was the substance of the conversation that I had at that time with Mr. Hanley about this matter.

Q. Well, now, did you have any talk with him also in regard to the waters of the west fork?

A. Yes. Before I come to that, I might say that the next day, I think it was, I again saw Judge Webster. He was in town, and was acting for Mr. Hanley, and I told the same thing to Judge Webster. I told him that I didn't want to be bothered about the Orphan ditch—that that had nothing to do with the matter whatever—but that he was taking all the water of the river. And Judge Webster said: “Well, I haven't talked to Mr. Hanley about that feature of the matter at all, but I will report to Mr. Hanley what you say.” The next week Mr. Hanley called me up, toward the end of the week—I guess it was on Saturday—and said that he wished to see me; not about anything in connection with the water whatever, but in connection with another matter entirely, that I don't know as it would do any good to go into at this time. I told him that I understood that he had an engagement to meet Mr. Corcoran at the Island Ranch on Sunday morning, and as I was going to be there, it would be satisfactory to me to meet him at the Island Ranch, and talk that particular matter over. He came there, and talked it over Sunday morning. This was Sunday morning—the 24th would that be, of April—I get these dates mixed; the 25th—the 25th of April. We talked over the matter that he came to talk about, and after we had exhausted that matter, I said:

(Testimony of Edward F. Treadwell.)

"Now, Mr. Hanley, there is something much more important than that." I says: "I have already told you of what you have been doing with the whole of the east fork of Silvies River. Now" I says, "I was very much surprised yesterday to find that you are doing the same thing with the west fork." I says: "I went down the west fork yesterday." I had gone down the day before, Saturday, in going to the Island Ranch, in company with Mr. Corcoran, had gone down the west fork of the river.

COURT: Whose ranch is the Island Ranch?

A. That is what we call the Company's ranch. It is just a name. I told Mr. Hanley, I says: "I went down there yesterday, to the west fork, and I found the dam at the Young place, and the ditches taking water." I says: "I went down to the Luig dam, and I found the Luig dam in the river, and taking all the water practically of the river. And I saw also the People's ditch, open and taking water unobstructed from the river. And I says: "Mr. Hanley, if you have nothing to do with those things, I want to know that. On the other hand, if you have anything to do with them, I want to know that, so that I can proceed accordingly." Mr. Hanley says: "Mr. Treadwell, you can take it from me that I have all to do with those matters." I then said to Mr. Hanley—

COURT: Did you understand by that that he had all to do with the matters on the west fork?

A. On the west fork, the three matters that I mentioned to him, with the dam at the Young place, the Luig dam, and the People's ditch so-called—those three mat-

(Testimony of Edward F. Treadwell.)

ters—and he said: “I have all to do with them.” I was not satisfied with that, so I said to Mr. Hanley, something as to the Young dam and ditch, because I was not sure whether he understood it or not, and he says: “Yes, I am the one that is using that.” He says: “I have a tenant”—my recollection is he said on Section—is it 19 or 29? 29—on Section 29, as I understand it. I don’t think it was 19. That would be immediately above it. I don’t know as that is Mr. Hanley’s land at all. At any rate, my idea is he said 29—“He has some grain, and I told him that he could use the dam and ditch to get the water.” I said: “Mr. Hanley, your land in 29 is on the east side of that fork of the river,” and I said: “I don’t know whether the water has gone there, because I was not on that side of the river. But the water is also going the other way to the west.” I says: “The water is going to the west side, also, and it is going through the ditch on that side of the river.” I don’t remember what further Mr. Hanley said, in regard to that matter, what explanation he made of it, whether he said that he didn’t know whether it was going in that direction or not. Really, at that point, our conversation broke up, and that was about all there was to it.”

* * * * *

“Q. Now, Mr. Treadwell, what was the condition of the water in the river during that time? I mean of the flood.

A. Why, there was no flood whatever in the west fork at all. The water was well within the banks. On

(Testimony of Edward F. Treadwell.)

Mr. Hanley's land, the channel is fairly good through Section 27. It gets very bad in Sections 34 and 35, as has been testified to here. But it is a sodded bank all the way along, and except in these low places, whether they are cut or what they are I don't know, the river was well within its banks, but close to the top of the bank; possibly an average of six inches below the bank, and some places less than that.

CROSS EXAMINATION.

Questions by Mr. Wood:

Mr. Treadwell, when was it that you first made this journey down the river, with Hanley, did I understand, by date, you can fix that. I think one meeting was Sunday, April 25th.

A. The first meeting was Sunday, April 18th.

Q. Just a week before?

A. Yes.

Q. Who were present—just you and he?

A. Just Mr. Hanley and myself, on the trip. I think the only other person we saw when we came back to the office, we saw Mr. Sterling the bookkeeper. We were alone on the trip.

Q. Did you see these cuts, with the shovel marks, the spade marks?

A. Not so I could testify to them that way, Mr. Wood. We didn't get out at any of them. The ones I noticed were not so much spade marks—I wouldn't be able to get close enough for that. The artificial effect

(Testimony of Edward F. Treadwell.)

of stakes and things of that kind I could see; but I could hardly testify that I was close enough to see any actual spade marks.

Q. Are you familiar enough with the banks there that in reference to say the 21 dam, or the Hanley house, or the bridge just at the house—starting from any point—that you could locate those places that seemed to have stakes and apparatus for diverting the water?

A. I don't think I could, Mr. Wood. I don't remember whether any of these photos are the same ones that I saw, or not.

Q. Well, how many of these places apparently arranged for water diversion, did you notice?

A. Either one or two with the stake affairs in them on that side. I wasn't across on the east side at all, you understand. I was only on the west side.

Q. Do you mean the West Fork?

A. No, the west side of the East Fork. I was only on one side, and I think probably these pictures are taken on the other side, so I didn't see those.

Q. Would you say they were in Section 27?

A. As I understand it, Mr. Hanley's house is near—it is not marked on this map.

Q. It is not very far below the 21 dam.

A. That is what I thought. I should say, then, that part of the things that I saw were on 21 as well as 27. But I would not undertake to locate them. But the water was undoubtedly coming out of the river partially on 21, where we went, as well as 27.

(Testimony of Edward F. Treadwell.)

Q. For our information, can you describe a little more in detail how these things were built?

A. One of them was built very much like this photograph that was here.

Q. And how permanent were they?

A. If I remember rightly, one of them that I saw—

Q. Will you just designate into the record, when you find it, the description of the photograph.

A. Most of them were smaller than these that have been described on the other side of the river by Mr. Griffing.

Q. You mean the other bank of the same river, the same fork?

A. Yes. This photograph, Exhibit 15, shows somewhat the manner of construction except the one that I saw was not nearly in place like that—it was practically all out, all open—but showed the same character of construction, but in much smaller manner; that is, unless that photograph is exaggerated, which I don't know, of course.

COURT: What is the number of that photograph?

A. Fifteen. But it showed stakes driven into the ground on both sides, where material could be easily placed to control it. That is the best I can describe it. We went down, trotted right along, and were talking all the way. While we were pretty close to the bank, we didn't stop at any of them. In fact, I said to Judge Webster, in addition to what I have said—I told him that I felt a little reluctance about this matter of taking

(Testimony of Edward F. Treadwell.)

any proceeding on that matter at that time, on account of the fact that I was Mr. Hanley's guest when I was down there; and it was not until these other matters came up on the other fork, that could not be overlooked, that this proceeding was brought.

Q. Well, you said that you understood Mr. Hanley to say that he assumed all responsibility for the Luig dam, the Young dam, and the People's ditch. You could not come reasonably near giving the conversation.

A. I could give you his exact language, and every word and letter of it on that subject.

Q. All right.

A. He says: "You can take it from me, Mr. Treadwell"—we were rising then to depart—he says: "You can take it from me, Mr. Treadwell, that I have all to do with it." That was his language.

Q. Well, the point with me is—now, we claim that he had all to do with the Luig dam; we exonerate Luig, and we admit that Hanley had all to do with that; but we still claim, as stated in his affidavit, that he had no more to do with the People's ditch than you did, and no more to do, while he claims ownership of the Young dam, that he had no more to do with its use than you did—and my point is to see whether you can definitely fix his assuming the responsibility as relating to the People's ditch and the Young dam, as well as the Luig dam.

A. I can, Mr. Wood, positively, that I mentioned to him the three things. I says: "I found the Young dam and ditch taking water. I found the People's ditch

(Testimony of Edward F. Treadwell.)

wide open, and I found the Luig dam taking all the water of the river; and I want to know—if you have nothing to do with those things, I want to know that; and if you, on the other hand, have got something to do with it, I want to know that.” And he says: “I have all to do with it.” And then we took up specifically the Young proposition, and he told me who, he understood, was using it, namely, his tenant, and that he had told him that he could go there and use it.”

* * * * *

“A. Mr. Hanley also mentioned a further conversation that I had with him, that I neglected to reply to. On the following Monday, Mr. Hanley returned to Burns, after I had seen him. He stopped his automobile on the street, and he said: “Mr. Treadwell, I will look into that situation on the west fork.” I said: “Mr. Hanley, you will find no situation when you go there.” That was my exact language to him, meaning by that, I had already directed our people to restore that river channel, in the condition we were entitled to have it.”

* * * * *

Referring to the diversion of water from the Young dam on the 24th and 25th of April, the witness testified as follows:

“Q. Was any going in the ditch leading out on the east side?

A. On the 24th, I am not sure. On the 25th Mr. Young took us to that side and there was no water. There was a little dampness in the bottom, but it would

(Testimony of John Gilcrest.)

not be at all clear that it was by diversion. It might be simply by seepage. There was no water on the east side. It was going to the west.

MR. JOHN GILCREST

The superintendent of the Pacific Live Stock Company, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Treadwell:

During the months of March and April, Mr. Gilcrest, where is the chief body of the land of the Pacific Live Stock Company, that is irrigated by the waters of the East and West Fork of Silvies River?

A. At what we call the Island Ranch.

Q. How far, in a general way, is the bulk of that land situated below the Hanley land and the Luig land where these various structures have been?

A. Practically joins their lands on the south—joins Mr. Hanley's lands.

Q. I mean where is the main body of the hay land, the big body of the hay land that the company irrigates?

A. As to distance from their land?

Q. Yes.

A. The main body is probably ten miles—eight to ten miles.

Q. That is the main body of land that is irrigated with the water, while it is in flood in March and April, is it?

(Testimony of John Gilcrest.)

A. It is.

Q. And the mere fact that some of this water that was diverted comes off on these tracts that adjoin the Hanley land, that does not help your land down there?

A. No.

MR. WOOD: You are leading.

MR. TREADWELL: Oh, yes, but we will get to that.

Q. Will you state to the Court what has been the condition of the water on our land this year, and the water of the river generally?

A. The main body of our hay land, we have practically had no water as yet. None with which to make a crop.

Q. What has been the condition of the river this year with reference to your knowledge of it, during the years you have known it?

A. It has been the lowest, generally, since the snow began melting. It has been the lowest I have seen it in 25 years.

Q. What is the general condition of snow in the mountains now?

A. Practically gone.

Q. So that, is the flood period past, or in the future, now, for this year?

A. The flood period for this year is past.

Q. And from your knowledge of the conditions, is it possible for you to make a crop of hay on your property unless you get the water during this flood period in March and April?

(Testimony of John Gilcrest.)

A. We cannot make a crop of hay.

Q. If, in the times permitted by this decree, now, that is, from the 1st to the 12th, these upper people put in their dams as required by the decree, will you get any material amount of water at all, out of the lower end?

A. We can grow less. Even the small amount we have now will be shut off.

Q. Do you know one of the principal dams of the company, on the east fork known as the Mace dam, down below the Hanley place?

A. Yes.

Q. About how far below the Hanley place is that?

A. He owns property down within a quarter of a mile of that.

Q. I mean how far below these points that have been covered by the testimony?

A. Less than a mile.

Q. Have you had any water down there?

A. Not up to the present time.

Q. Will you explain to the court, Mr. Gilcrest—

A. Excuse me a moment. I said not up to the present time. The last time I came by, there was water coming from the Mace dam.

Q. How much?

A. A small quantity. I didn't measure it. I don't know as it was measured.

Q. This water that is diverted by Hanley over to the east, does that come back to the river above your Mace dam?

A. It does not.

(Testimony of John Gilcrest.)

Q. That water that goes through the drain ditch, where does that go to?

A. It flows in the Embree slough and eventually into the East Fork of the river again, at or near what is known as the Embree Bridge; the road from the Hanley ranch crosses.

Q. That is below points of diversion?

A. Yes, below all the points of diversion.

Q. You have some lands, though, below that?

A. We have lands below that.

Q. Do you know whether the water that is diverted out into the Hanley drain ditch goes onto any of the Hanley land in that vicinity, or not? Have you gone over that, or not?

A. I have not; not this season.

Q. Will you explain to the court the condition of the river channel in the vicinity of Section 34 and 35, and your object and purpose in constructing that Orphan ditch?

A. Our object and purpose was to keep the flood water and the water diverted by Mr. Hanley onto his Section 27, from submerging our Section 34, making it as it used to be, tule and flag, principally. The ditch was first constructed, a small ditch, by Mr. Clemens, I think, Mr. Smith, Mr. Porter, Mr. Peary—

Q. That was before you purchased the property?

A. Yes, sir, before we purchased the property.

Q. Has the construction of that ditch reclaimed that land, so you now can cut hay, principally?

(Testimony of John Gilcrest.)

A. It has. It is one of the best hay sections we have at present.

Q. Will you state to the court what the condition of the channel is down there between 34 and 35.

A. The river channel comes into the company's land in Section 34, the northeast corner of the northeast quarter, makes a short turn into that section, then goes back onto Section 35, the land of Mr. Hanley, runs down through that, traversing the west half of the west half of the northwest quarter of Section 35. Then somewhere near the quarter section corner on the line between 34 and 35, it turns back into Section 34, this company's land.

Q. What is the character of the channel through there?

A. The character of the channel immediately below the head of the Orphan ditch, where it traverses Mr. Hanley's land, through 35 back to 34, is very narrow, and very much choked up, grown up with tule, floating matter, dead animals lodged in it. Any floating material down the stream lodges in there against the tules, and it is very much choked up. From where it enters Section 34, it was exactly in the same condition as I speak of in former years, and I had it opened up to give it free vent. It has been said that there is no fall there. Since that channel was opened up through our part, through where it goes into 34, and passes out of 34 into 3, it has a very good current, carries the water.

Q. You have offered to Mr. Hanley to build a

(Testimony of John Gilcrest.)

channel for the river between those two sections that would have a good channel through there, have you?

A. I have.

Q. Have you actually constructed your half of it along your line?

A. I have.

Q. Is it there now?

A. It is there now. From where the river comes back into our Section 34. I have constructed a channel, opened up an old channel.

Q. Did he agree to do that?

A. He did not. It was once agreed upon, some 20 years ago, by his brother and myself, but it was never done. Since then, he has refused to do it.

Q. So Mr. Hanley has refused to put a channel there, that would reclaim his land, and reclaim your land?

A. He has refused to open that channel up.

Q. And the one that you have put in a sort of ditch along your line there, is that what you refer to, or do you refer to the channel itself?

A. I refer to the channel that I constructed. What is known as a ditch along our line on the east side of the northeast quarter of 34, was the ditch—is the borrow pit from which we took material to levee the line, to prevent flooding our land when he was letting all the water go over and flood over the country. It would submerge 34 from there just the same.

Q. So you don't use that as a channel or irrigating ditch?

(Testimony of John Gilcrest.)

A. We do not. That was constructed solely for a levee to prevent the overflow from his land coming back onto ours.

Q. If Mr. Hanley would construct the same on his line, then the two of them together would make a river channel and protect both places, would it not?

A. It would.

Q. That is what he has refused to do? Is that not so?

A. Yes, sir.

Q. You went and saw this 21 dam, did you, in the condition Mr. Griffing has testified to when it had the one board in, and the brush?

A. I did.

Q. When did you see it in that condition?

A. That was on the 25th of April."

* * * * *

"Q. Every year, do you go up the river to see whether any of the dams are in at times they shouldn't be permitted by the decree?

A. I do every year.

Q. Have you ever known the Luig dam to be used at any time except when it was permitted by the decree?

A. Never except in the fall of the year, when they carelessly leave the boards, and the manure and the hay in it, and the river is very low. I have noticed a number of times then, the brush and stuff, and have complained about it, and notified Mr. Luig through his attorney.

(Testimony of John Gilcrest.)

Q. But it has never been used for irrigating prior to the time that the decree permits it to be used?

A. Never to my knowledge—until this year.

CROSS EXAMINATION.

Questions by Mr. Wood.

When was this agreement made between you and Ed Hanley and William Hanley to open up the old channel of the river, through the tule marshes in 34 and 35?

A. Some 20 years ago, between Ed Hanley and myself.

Q. Why didn't you do it right away then?

A. Through press of other matters at that time.

Q. When was it brought up then, with William Hanley?

A. After he came over into the country and took charge of their property.

Q. How long ago is that?

A. Just how many years ago, I don't know, but it was a good many years ago.

Q. Is that the time that he refused?

A. I think the only time that I talked the matter over with him personally, that he refused.

Q. And that was a great many years ago?

A. A good many years ago.

Q. Now, your object of the Orphan headgate—the ditch leading out of it—the opening up of the river channel in 34, and the dike is this, as I understand it, that naturally and originally, 34 was flag and tule marsh,

(Testimony of John Gilcrest.)

and that that was made by the spring flood getting out over the banks of the river, and coming down onto that section, and settling there on low land; and a good deal of it came down over Section 29; and that if you can dike that water off from getting onto your land, and then drain your land, you reclaim it and make it as it now is, a good hay section? Is that it?

A. If we can keep the flood water from it, from standing on it.

Q. Yes.

A. That is a basin—the lowest depression in that whole territory—34 and 35.

Q. Now, if you bank up, or dike up this water that comes down over Hanley's Section 29, and don't provide for carrying it off,—

MR. MINOR: Do you mean 29?

Q. 27, I should say; and I think I said 29 before. That should have been 27. If you bank that water up, and prevent it coming on 34, you do reclaim your swamp on that land, but unless you provide a means of rapidly carrying it off, you also bank it up on Hanley's 27, don't you?

A. We built a ditch that we supposed—and I think it does; this is the first year that levee has been built, since the water—it was built last fall, the levee was completed—we think that the ditch will carry the water that comes off from his 27, and take it entirely away.

Q. I think you were in court and heard Mr. Griffing testify that the Orphan ditch would only carry about, I think he said, 12 cubic feet; but whatever he said, he

(Testimony of John Gilcrest.)

did say that that ditch would fill up when the river was normally full, and it would then be full to its carrying capacity from the river; and naturally, you cannot put a quart into a pint cup, and any more water coming down over 27 would have no place to go—the ditch would be full—so it would have to bank up on Hanley, wouldn't it?

A. We wouldn't use it from the Orphan headgate, don't propose to use it from the Orphan headgate; when there is sufficient water coming off 27 to fill the ditch.

Q. I want to avoid putting you back on the stand, in rebuttal, for anything that we can anticipate now. You know Hanley, in his affidavit, says that you are backing the water up on him today, to the injury of about a quarter section of land. What have you got to say about that?

A. We were not backing the water up on him, when I saw it. It is a mistake.

Q. Would it be possible, in your opinion, for your reclamation system of 34, to throw the water back onto Hanley?

A. If he continues in diverting the water, both from his dam and those openings in the river bank, in excess of any earthly necessity, he can put out water enough there that we cannot carry in that ditch, and it would back it up—no question about that. It would—that levee on the south side of the ditch, the lower bank of the ditch.

Q. Well, now, Section 27 from time immemorial

(Testimony of John Gilcrest.)

has been naturally flooded, hasn't it; without any operation of Hanley's? It was flooded in the Indian country, wasn't it?

A. I was not there.

Q. Well, from what you would see of the situation, wouldn't you say that? I was, but I couldn't testify on that point.

A. The lower part of it has, in former years, been naturally flooded from the choked up condition of the channel through 34 and 35.

COURT: How does that Orphan ditch carry off the surplus water?

A. It runs along his south line of 27, our north line of 34. There is no bank on this ditch, on the upper side. The flood water and excess water off his 27 flows uninterrupted into this ditch. On the south bank of it, the lower bank of it, we have built a large levee clear across and carry that water onto the west, onto our lands further west, and prevent its overflow. In former years, since that ditch was built, such an excess of water came across 27 that it obliterated our ditch bank, and no matter what we turned out at the Orphan headgate, it made no current. The cross current off 27 was so much greater that the water coming out of the Orphan headgate simply mingled with it, when it struck it, and went on south, across 34, and submerged it.

COURT: Was it your intention by that Orphan ditch to carry the surplus water to the west and thence down below?

(Testimony of John Gilcrest.)

A. Yes, sir, to our lands adjoining 34—33 and Section 4.

COURT: Was that sufficient to carry off the flood waters, except in cases where there was a great deal of water?

A. From the river itself?

COURT: No, that came over off Section 27?

A. I thought it was sufficient—would be sufficient to carry the excess water coming off 27 further out where we needed it. We didn't want it on 34—it ruined it. It submerged it and grew nothing but tule, and there was no way of getting it off—tule and flag.

COURT: Was the condition of the land to the west at the end of the ditch low enough so that the water would naturally run that way after digging your ditch?

A. Yes.

MR. TREADWELL: I want to call your attention to an error you made. You said Mr. Griffing said it would only carry 12 feet. What he said was it would carry 27 feet at the head; lower down it took 90 feet.

MR. WOOD: His record would show. I didn't pretend to have the memory of it.

MR. TREADWELL: It is only an error.

Q. Mr. Gilchrist, as a matter of fact, you get, as it were, a double benefit from keeping the water off the marsh pool, or basin of 34, because in keeping it off that, you carry it on to other lands you own, and get it for irrigation purposes? So you both reclaim a marsh, and irrigate your lands, don't you?

(Testimony of John Gilcrest.)

A. We claim that we are entitled to that water below for lands below that need it much worse. We could irrigate 34, and the lands to the west of that from the Orphan headgate.

Q. That doesn't quite answer my question. I will put it briefly. You get a benefit on other lands that you own, from the water that you conduct away from Hanley's 27 and your 34, don't you?

A. We do get a benefit from it in that way.

Q. Now, the Judge asked you about the Orphan headgate. As a matter of fact, its origin was a simple diversion of stock water, wasn't it?

A. I think that was its origin, yes, sir.

Q. Who were the men you say put it in?

A. Porter, Clemens —

Q. Smith?

A. Not at that time. I don't think Smith had any interest in it at that time. He may have had, but I don't think he had.

COURT: Mr. Clemens had a ranch down there, didn't he?

A. Yes, he owned 33 at that time, and the north half of four.

COURT: Was his ranch also irrigated by flood waters at any time?

A. Yes, sir, flood waters from above him, and from a slough from the east bank that came in, about the northwest corner of Section 33. The flood water came from there.

Q. This headgate, this ditch and headgate, that was

(Testimony of John Gilcrest.)

put in to carry stock water out, by these men, is not the same structure as now?

A. It was not.

Q. In fact, in the former proceeding, your company disclaimed any interest in that stock water ditch, and that is the way it got the name of the Orphan, wasn't it?

A. No, I think we never disclaimed any interest in the ditch, because when it was first built, it was for stock water, and we got stock water from it, in the same way that Clemens did. It passed through his Section 33, north half of 4, and into——

Q. What was it you did disclaim?

A. We disclaimed that they could use it at any and all times, as they eventually tried to do.

Q. You disclaimed any responsibility for keeping up the headgate, or keeping it in repair, didn't you?

A. We did, because at that time, they were to keep it in repair. That was the understanding.

Q. So afterwards you bought their property?

A. We did.

Q. So now, you are successor to their rights?

A. We are."

* * * * *

"Q. Now, Mr. Treadwell asked you if you made an inspection of the river when the flood season came on, to see that the dams and things were open. Do you make that inspection personally?

A. Personally.

Q. Every year?

(Testimony of John Gilcrest.)

A. Every year.

Q. And how often?

A. Several times.

Q. Several times during the irrigating season?

A. Prior to the dates that they are permitted to put in their boards.

Q. You are handling a good deal of property. You are handling, as manager, all of the company's Oregon property, aren't you?

A. I am.

Q. You are away a good deal. It covers a good of territory, doesn't it?

A. A good deal of territory.

Q. What I am trying to get at is, would it be possible that these dams could have been there and you not know it, in former times?

A. Yes, they might be in times that I am absent. But it is a very important matter,—nothing more so—in the spring to get that flood water, and I always make it a point to be there at those times, and look into it myself.

Q. Now, you say this is the lowest that the river has been in your recollection, I think you said?

A. I did.

Q. Still there has been a flood, hasn't there? That is, there has been an increase in volume?

A. There has been an increase.

Q. With the melting snows, and the spring rains?

A. Yes. There has been no flood.

Q. What would you designate a flood?

A. When the river goes out of its banks at points.

(Testimony of John Gilcrest.)

Q. Wasn't the river out of its banks at all this year?

A. At no point that I saw was it out of its banks.

Q. Well, I understood both the young engineer here, Mr. Griffing, and Mr. Treadwell to say that at times early in April, I think they put it,—it might possibly have been March—the river was so nearly bank full, that it was running out from the depressions and low places in the bank?

A. That is true.

Q. You wouldn't call that a flood?

A. I would not. Those depressions, or cuts, or openings, were not as the bank was originally. The sod was broken. There were openings there. The water could go out when it was not nearly bank full.

Q. You mean by flood, that the whole river gets out over the bank its entire length?

A. No, I don't.

Q. Spreads out over the country?

A. No, no. When it goes out of its banks naturally, at points that it has in former years, and it is specified in the decree in several places as to some parties defendant in the decree, that they were entitled to the water that got out of the banks naturally at flood times, before they had the right to put their boards in.

Q. Well, then, the river always, even in what you call flood time, has some part of its banks out of water, and it gets its relief through what you might call safety valves, natural depressions in the bank?

A. It does."

(Testimony of John Gilcrest.)

“Q. Mr. Gilchrist, in putting in this Orphan head-gate and ditch, was the main purpose to reclaim 34 or to carry out irrigation water to three and four?

A. Both.

Q. You could not say which was the most important?

A. No, about equal.”

* * * * *

“Q. Mr. Gilchrist, I talked with Mr. Hanley at lunch about your statement that he refused to, cooperate with you in opening up the channel of the river, and I will be frank to say he does not recall it. Could you be more specific about the conversation, when and where it was, to refresh his memory?

A. No, I cannot; but we discussed it numerous times. I think I was mistaken this morning in saying that he never had agreed after his brother Ed Hanley had left the country, practically given up the handling of the property, that he never had agreed with us in opening that river channel down through there between 34 and 35. I am sure that I was mistaken, because I think one time Mr. Hanley and Mr. Kenyon, Mr. Minor and I think, yes, Mr. Johnson, Civil Engineer up there, we were all, I think, at the same time right there at the corner of 34 and 35, right at the northeast corner, and we discussed the matter, and he said then that he was willing to join us in making it.

Q. About when was that?

A. Oh, I can't remember the year. I don't recollect the year, I remember the circumstance.

(Testimony of Ben Newman.)

Q. Could you say, however, about how long ago, eight years, ten years?

A. I should say fully eight years ago, or more; eight years ago anyway."

MR. BEN NEWMAN,

Foreman of the complainant's Island Ranch, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Treadwell:

"Will you state to the Court when you first noticed Mr. Hanley taking water from the river through the drain ditch this year?

A. Well, all through March, and up until about the 8th of April, it was going out through there.

Q. Will you state what, if any, effect that had early in the year, even, on your stock water?

A. Why, I went up there in March, two different times, and put in two boards clear across this channel, to try to get some water down to the Orphan headgate, where I had some cattle out in Section 4. I could not get any water there, so I had to finally put in a gasoline engine and pump water there for the cattle.

Q. You mean you tried to shut up the drain ditch so as to force water, down the river—to force water down the river, where you could take it out for cattle?

A. Yes. But the headgate at the drain ditch was in

(Testimony of Ben Newman.)

very bad condition. It had a lot of hay and such stuff, and float in it.

Q. During this season do you know the dam of the company known as the Mace dam?

A. Yes, sir.

Q. What, if any, water have you had down there, Mr. Newman?

A. We haven't had a great deal there until about the 20th of April.

Q. Is it the custom of the company to take water at that point?

A. Yes, sir.

Q. What land is irrigated by that?

A. What we call the Mace field, and the Turrell field there.

COURT: Can you describe those by the sectional subdivisions?

A. Section 2, I guess the Mace field is.

Q. The dam that you refer to as the Mace place is the one that is marked here as the H. B. Mace dam in Section 2, is it?

A. Yes.

Q. That is the company's dam?

A. Yes, sir.

Q. Where is the land of the company that is particularly irrigated by that?

A. Right south of the dam, in what is known as the Turrell field. I guess it would be in—it would be part of these two, I think,—the south half of it.

(Testimony of Ben Newman.)

Q. That is, the ones that have the circles around are the company's land?

A. I don't know just what section that is in. We call it the Turrell field.

COURT: What is the section?

A. 12 and 11.

Q. So it would be 11, 12 and 2, would it?

A. Yes.

Q. In the big Island field itself, down below the house, the big hay field, will you state to the court what the condition of that has been this year.

A. There is practically no water on it. It is dry, you might say.

Q. During the time that you have been on this ranch, is it part of your duty to examine the river to see whether the dams are kept up during the period that the decree provides the river shall be open?

A. Yes, it is.

Q. Do you go up and down the river every year for that purpose?

A. Yes, sir, very often.

Q. Prior to this year, have you ever known the Luig dam, or that old skeleton of the Voegtly dam, to be maintained in the river, prior to the time allowed by the decree?

A. No, sir.

(Testimony of Ben Newman.)

CROSS EXAMINATION.

Questions by Mr. Wood:

Mr. Newman, when was it you saw this drain ditch of Hanley's full of water?

A. Well, it was pretty nearly all through March and up until about the 7th day of April.

Q. Did you make frequent visits?

A. I went up there once or twice every week.

Q. I will ask you, in all your testimony now, to just state what you yourself know.

A. Yes.

Q. You say that in that interval from the first of March to the 6th of April, you were up numerous times?

A. Yes, sir.

Q. Was it always full of water?

A. It always had about the same amount, excepting some nights it would be a little cold, perhaps, it would be up and down, as it usually is there at that point.

Q. Well, now, isn't that a good headgate constructed just in the same character as one of the dams in the river—good substantial?

A. No, sir, it is not a good headgate.

Q. Suitable structure, isn't it?

A. It was at one time, but it is pretty well rotted away.

Q. That is, the structure of it?

A. It was at one time.

(Testimony of Ben Newman.)

Q. I say, that is the character of the structure, that is the way it was built?

A. Yes.

Q. Where is it rotten?

A. Well, on the sides of it.

Q. What is the effect of the rot?

A. Well, it is just like any other rot, of timber and water.

Q. Well, I know, but how does it affect the efficiency of the headgate?

A. Well, naturally, water will seep through places like that, you know, from the wings and go around it on either side of it.

Q. Did you notice that there was much flow of water in the drain ditch?

A. Yes.

Q. Was it moving pretty rapidly?

A. There was during the month of March, and up until the first part of April.

Q. What was the state of the river at that same time?

A. Well, the river down at the northwest—north of the Orphan headgate, was very low there at that time.

Q. How was it up by the Hanley drain ditch head?

A. There was considerable water in there, but this drain ditch is lower than the channel of the river is; when the boards are taken out of that, it practically takes all the water that is in the river there.

(Testimony of Ben Newman.)

Q. So that I understand that the boards were out during all these times that you were up there?

A. Yes, sir, I think until about the 7th or 8th of April, some one put them in and also hauled some hay and stuff and put around it.

Q. No flood water at this time?

A. Well, not to speak of, like usually.

Q. When was it you attempted to replace the boards yourself?

A. I don't remember just exactly the date. It was in March.

Q. I don't expect you always to remember the date, unless you made a note of it, but you might remember possibly whether it was the early, middle, or late March.

A. Well, it was about the middle of March, and also the latter end of March.

Q. Just state a little exactly, what you did, will you?

A. I put two boards in the dam, that was laying out on the bank, to try to force more water down the natural river channel.

Q. Did you do anything else?

A. No, sir, nothing whatever.

MR. TREADWELL: The dam—you mean the headgate?

A. The headgate, yes.

Q. We are talking now about the drain ditch headgate; that is what you understand?

A. Yes.

(Testimony of Ben Newman.)

Q. What effect did these boards have?

A. They naturally would turn more water down the river channel.

Q. Did that complete the entire dam, or headgate? Did that make it fully up, or were there more boards?

A. No, there were some more boards there.

Q. Why didn't you put more boards in?

A. Well, I didn't think it was necessary. In fact, there was water running around each wing at that time, and I didn't think it would hold any of it.

Q. How much water?

A. Well, not a great deal, but as you would raise it—put more boards in, it would have more pressure on it, of course. It would force it around that much worse.

Q. Well, you fixed it to your own satisfaction, as far as you were then concerned?

A. I didn't do anything, only put in two boards.

Q. Did you complain to Mr. Hanley, or Mr. Sterling, or anybody about the rotten condition?

A. No, sir.

Q. Or call their attention to any of the difficulties that you were having?

A. No, sir.

Q. You didn't say anything to anybody?

A. No.

Q. Well, that is right near their house, isn't it?

A. Well, it is, oh, a mile or better, I guess, from the house.

Q. Well, a mile is nothing up in that country, is it?

A. It is that much.

(Testimony of Ben Newman.)

Q. Yes, I know it is—it is a mile but that is considered in that country not far to go to speak to a neighbor, is it?

A. Well, it is just as far in that country as it is in this country, I should judge. A mile is a mile anywhere.

Q. Yes. Now, you went there constantly then, during that same interval that you have spoken of, from the 1st of March to the 6th of April?

A. Yes.

Q. My understanding of your answer is, you intended to say that at no time did you call anybody's attention this grievance, or make any complaint about it?

A. No, sir.

Q. Now, where was it that you needed this stock water, down at the Orphan headgate, or below?

A. In Section 4, I had a bunch of cattle I was feeding. I wanted to get some water into Section 4, right west of Mr. Hanley's 3.

Q. That was at what date?

A. That was in March.

Q. And you think the reason you didn't get any, or sufficient stock water, was because of the Hanley drain ditch.

A. Well, that was the most of the condition, I guess. It would turn more water to the east there.

Q. Yet you went up and stopped it yourself?

A. Yes, but some one went and had taken those boards out again.

Q. Well, you went back frequently?

(Testimony of Ben Newman.)

A. Yes, I put them back the second time, but yet they was taken out after that.

Q. When you got down there, did you find that gave you all the stock water you wanted?

A. No, sir, it didn't.

Q. Where was the leak? What was the trouble?

A. It seemed to keep still, going to the east through the drain ditch.

Q. Through the drain ditch?

A. Yes.

Q. It would have to go through the headgate, wouldn't it?

A. Yes, sir.

Q. You just now said that very little water was going around the wings.

A. Yes, sir.

Q. So that, apparently, as I look at it, your explanation doesn't explain why you didn't get stock water.

A. If sone one goes and takes the boards out after you put them in, I don't suppose that would check the water, would it?

Q. No, it would not. But do you mean to say you have reason to believe, within an hour or so after you put them in, they were taken out?

A. I didn't say within an hour or so. I said some time within four or five days.

Q. Yes; well, it doesn't take the water four or five days to go from the drain gate to the Orphan headgate?

A. No.

Q. Yet you say you didn't notice any appreciable

(Testimony of Ben Newman.)

benefit to you down there. I am not trying to confuse you. What I am trying to get at is this: If the drain ditch did not carry away the water you wanted for stock water, what did? Where did it go? Where was the leak?

A. Well, it must have been that it carried the water away that we tried to get for stock water, because I referred that I had shut it up twice, and some one had went and taken the boards out again.

Q. Your theory is then, that the drain ditch was the trouble?

A. It was, at that time.

Q. Well, we are talking about that time now. Well, now, what was the trouble later on?

A. Well, the condition remained that way up until about the 7th or 8th of April, and I think probably some of Mr. Hanley's men shut it up again. Then we got considerable water out there.

Q. Were the boards they put in better than the boards you put in?

A. No, but they had hauled some hay and stuff, and tamped down around these places, so as it would hold them.

Q. You think stopping those leaks around the wings made all the difference?

A. It would make some difference, of course.

Q. You said there wasn't very much water going around the wings. Now, I simply want to give you a chance to give your theory.

A. I said there was not much going around the

(Testimony of Ben Newman.)

wings at the time I was there, when I put those two boards in.

Q. Now, after he stopped it up, and tamped it with the hay, then you got plenty of water, did you?

A. Yes, sir, we got plenty of water then.

Q. And that was the only change in the length of the river, so far as you know, was just that change in the drain ditch.

A. Yes, sir.

Q. Now, when was the high water this year in the river?

A. Well, I don't remember exactly the date, what time the highest water was. I didn't measure it. Some time along the first part of April, I guess, was probably as high as it got.

Q. How long did it continue?

A. Well, not a great while. I don't remember just exactly how many days.

Q. What?

A. I say I don't remember just how many days the water was at the highest point.

Q. Approximately a week—two weeks—three weeks?

A. Possibly a week.

Q. Possibly a week?

A. Yes.

Q. That would be the outside?

A. I think so.

Q. Would it, or would it be ten days?

(Testimony of Ben Newman.)

A. I don't think it would be ten days it stayed at the highest point.

Q. Did it get so high that it went out of the river at any points on the bank?

A. Yes, sir, it overflowed the banks through 27 there.

Q. That is Hanley?

A. Yes, sir.

Q. Anywhere else?

A. Not particular that I know of.

Q. His was the only place.

A. Yes, sir.

Q. Did you examine the river at that time to see where it was flowing out?

A. Yes.

Q. And on 27, on Hanley's place, was practically the only overflow.

A. Yes, sir.

Q. And you made it a point, as you say, to examine frequently?

A. Yes, sir.

Q. Had the river always been accustomed to overflow on Hanley's Section 27.

A. Yes, sir.

Q. Had it been accustomed to overflow on other sections that you know of?

A. Yes, sir.

Q. What other sections?

A. All other sections along the river there at flood time of the year.

(Testimony of W. D. Hanley.)

Q. The river bank is full of natural depressions, is it not, and cuts?

A. Well, not full, I don't think.

Q. A good many of them?

A. Well, there is some few, yes.

Q. Well, isn't the whole river bank from the canyon down more or less indented and especially where it comes out on the level, and the river bank gets higher than the surrounding country.

A. Yes, sir.

REDIRECT EXAMINATION.

Q. Mr. Newman, you stated that you didn't have enough stock water; you couldn't get it down?

A. Yes.

Q. Then later on, you said that after Mr. Hanley closed up the drain ditch, you had plenty of water—what did you refer to?

A. To the stock water.

Q. You didn't refer to irrigation?

A. No, sir."

MR. WILLIAM HANLEY.

The defendant William Hanley testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Wood:

"Mr. Hanley, by the first article of the information against you in this proceeding, you are charged with

(Testimony of W. D. Hanley.)

aiding and abetting Henry Luig in taking water out of the west fork of Silvies River by means of what is known as the Luig dam, here so called, being in Section 31, township 23 south, range 31 east, from the 15th of May till the 1st of July—no, about the month of April of this year. I wish you would state whether you conspired with Luig or anybody else in this matter, or what interest Luig had in it?

A. I haven't seen Mr. Luig only about once in three or four years. I got some cattle of him this spring, but as far as this dam is concerned, he had nothing to do with putting the boards in and closing it up. This is not a Luig dam, it is the real 31 dam, and belongs to 31. Mr. Luig's right in this dam commenced, I would say, about 1900, that they helped me construct the present dam that is in there, as a matter of accommodation, additional right to the dam that they had down at their place. They had a dam at their house, about half way through Section 6, I think is where the Luig dam really is.

COURT: This dam then is your dam and not Luig's?

A. Yes, it is the 31 dam.

COURT: Did you claim it was your dam at the time?

A. Well, I claim it now as my dam as the William Hanley Company, as the owner of 31.

COURT: Section 31.

A. This dam originally, the construction of a dam

(Testimony of W. D. Hanley.)

in 31 commenced back in the latter part of the eighties.

Q. Who built it first?

A. Pete Stenger built the first dam on 31.

COURT: Was that prior to this litigation?

A. Prior. About 1887, I think, it dates. The litigation commenced, the commencement of this was about 1900.

Q. And from the Stenger ownership to what ownership did it pass?

A. It passed to me under lease.

Q. Well, you mean the dam under lease?

A. The section.

Q. Pete Stenger had 31 leased, did he?

A. Had 31 leased.

Q. From whom?

A. From the Willamette Valley & Cascade Mountain Wagon Road Company.

Q. What was the purpose of building this dam?

A. It was to spread the water on 31 to irrigate it.

Q. Was that its original purpose of construction?

A. Yes, sir.

Q. Well, now, to Stenger, you succeeded, as succeeding to his lease? Did I understand right?

A. Yes, to his lease.

Q. Was this dam that is in question here today, the same identical physical dam that was there originally?

A. No, it is not. It is further down than the original dam.

Q. Well, when was this one put in?

A. This one was put in, I would say, in 1898.

(Testimony of W. D. Hanley.)

Q. Before the decree?

A. Yes, before any litigation.

Q. This dam was in existence at the time of the decree?

A. Yes.

Q. When did Luig get an interest in using water diverted by this dam?

A. In 1898.

Q. For what consideration?

A. Oh, just as a matter of assisting me in putting it in.

COURT: How much of his land is watered from that diversion?

A. Why, I never followed that out in detail. As a matter of fact, he could irrigate all of it from it, because it would be above it. The gravity would irrigate all of it, but I wouldn't say how much of it does actually irrigate, but I think practically all of it.

COURT: How much has he?

A. In Section 6 he has 320 acres—half of it. The river itself runs right through this half section he has, I think, all the way.

MR. WOOD: I have the deeds down in my office, and for convenience, I will ask into the record, who is the owner now of Section 31?

A. The William Hanley Company.

Q. From whom did they buy it?

A. Why, I think that the contract first was to you, and later it was turned into William Hanley Company—to you personally.

(Testimony of W. D. Hanley.)

Q. Yes. And the title is derived from this Land Grant Company?

A. From the Willamette Valley Wagon Road Company.

Q. Well, now, so far as this contempt is concerned, the putting in of those boards in the month of April you assumed the entire responsibility of?

A. Yes, sir.

Q. And exonerate Luig?

A. Yes, sir.

A. Now, by the second article of the information, you are charged with conspiring with George Young and Hull Hotchkiss and Carey Thornburg, in violating the decree by putting the boards in the dam known as the Young dam, in the northeast quarter of Section 30, township 23 south, range 31 east. Now, first as to the conspiracy, in aiding and abetting those men Young and Hotchkiss, I want you to state whether you had anything to do with them, or anything to do with that dam this year.

A. Not a thing. I have not even visited with any of them that I know of, excepting Mr. Thornburg, who has charge of 31, who handles it, and cuts the hay off of it.

Q. He has charge for whom?

A. For the William Hanley Company.

Q. So that he is your representative for 31?

A. Yes, for 31.

Q. Has Section 31 anything to do with the Young dam?

A. Not a thing. The Young dam—the Young dam

(Testimony of W. D. Hanley.)

really belongs to the William Hanley Company now. That is, they have paid Mr. Young for the dam.

COURT: Whose land is that on, Mr. Hanley?

A. It is on Section 19.

COURT: Is that on your land?

A. Yes, it belongs to the Harney Valley Improvement Company, 19, 20 —

COURT: It is on 19, is it?

A. It is on 19.

COURT: Not on 30?

A. Not on 30. Mr. Young said that he had got some hay from me, and that he was going to take it out, and if I would square off his hay bill, that he would turn me over his interest in the dam, that he didn't expect to use it any more, that he had been held for contempt, or something about it, but he said if I didn't take it, why, he would take it out. So that I squared off his hay bill, and taken his interest in the dam.

Q. Now, did Young also help to build the dam, and get the original right of water diversion, as far as you were concerned, for helping construction?

A. In which? In the Young dam?

Q. In the Young dam.

A. Why, he had been the entire owner of it up to the time that he turned it over to me. That is, as far as I know, that he was the owner of it.

COURT: That Young dam was comprised in the suit, was it?

MR. TREADWELL: Yes, your Honor.

(Testimony of W. D. Hanley.)

MR. WOOD: Yes, sir. Now, I will state to the court at this time, that I prepared Mr. Hanley's affidavit with extreme haste, and it may be inferred there is a contradiction between his affidavit and his present statement. I would like to bring that out.

COURT: Very well.

Q. I understood you, at the time I was dictating your affidavit filed here, that when you took the dam over, you didn't know that it had been the subject of a ruling in contempt proceedings. Evidently that is my mistake, because I now understand you to say that Young told you that he was prohibited from using it.

A. Yes.

Q. So your present statement here is correct?

A. Yes.

Q. Now, what was your purpose in acquiring the Young dam? For what use did you intend to put it to?

A. To get some water on Section 29.

Q. Was that involved in the decree?

A. No, sir.

Q. Who was the owner of 29 at the time of the decree?

MR. TREADWELL: Just a moment, please. We want to object to the question as to whether it was involved in the decree, on the ground the decree is the best evidence of what is involved in it.

MR. WOOD: Of course it is. I suppose we will all come to that and interpret it. I can amend the ques-

(Testimony of W. D. Hanley.)

tion by saying, did you understand it was involved in the decree.

Q. Did you understand Section 29 was ever involved in litigation?

A. It was not.

Q. I say, did you understand it was or was not?

A. It was not.

Q. Who was the owner at the time of the decree, of 29?

A. Why, the Willamette Valley & Cascade Wagon Road Company.

Q. Strictly speaking, Mr. Hanley, at that time, I think the title had all vested in Charles Altschul.

A. Well, probably in Charles Altschul.

COURT: Was Altschul a party?

MR. WOOD: No, your Honor.

Q. Well, what was your purpose in acquiring the Young dam in relation to 29? What use did you propose to make of it?

A. To get some water on 29. I have leased it at the present time, two years ago, I leased it to a party to put in grain, and I expected to use it to get a little water on this grain crop, so that I could raise some grain.

Q. Who is the fee simple owner of 29 now? Who owns the title?

A. The William Hanley Company.

Q. Now, so that there may be no confusion, regardless of your ownership of the Young dam, and regardless of your intent to use it, had you ordered it used this year, or did you know it was being used?

(Testimony of W. D. Hanley.)

A. Why, I never knew that it was being used, or it were used, till Mr. Treadwell told me at the Pacific Livestock Company's ranch, on the Sunday, I think the date is, as stated by Mr. Treadwell, May 24th.

Q. Had you ordered it to be used?

A. No, sir.

Q. And do you know now who put the boards in and who started to use it?

A. Why, I went and looked at it after all this fuss came up, and Mr. Treadwell had started these proceedings, I went and looked at the Young dam, and I seen there hadn't been any boards in it, nor there hadn't been any water went out on the east side.

Q. Well, had any water gone out on the west side?

A. Yes, there had been some water went out on the west side.

Q. Where would that go to?

A. Why, that would go onto Mr. Hotchkiss, in Section 30, I think. Yes, 30.

Q. Well, now, you said there hadn't been any boards in. There would have to be boards in, to throw that water out, wouldn't there?

A. Oh, no, no. There was plenty of water, as far as the river was concerned. It was practically full all spring. It was practically full, after the water commenced running, and I think, probably—I don't want to contradict any witnesses,—it is really bearing down a little on exceptionally dry season, while it is a dry season, but the Foley Slough has run some water, some consid-

(Testimony of W. D. Hanley.)

erable water. The Foley Slough is really the safety valve to the river.

COURT: Where is that located?

A. That is located above where the river comes into the valley.

COURT: Up in the upper valley?

A. No, in the Harney Valley, about two miles above where the canyon comes in. It is a slough that works as a kind of automatic valve to the river. When there is excessive water comes, this slough raises exceedingly high—will probably take out twice or three times as much as this river channel—and then, as it drops back, the river will hold the water and the slough will reduce much faster as it gets lower.

COURT: Operates as a reservoir?

A. Operates as automatic relief to what is known as the river channel.

COURT: Not as a reservoir, then?

A. Not as a reservoir, but it runs down on the east side east of the river. But when the Foley Slough does run considerable water, it indicates that there is an excess of what the river will carry. While I would not want to lead the Court to understand that the river was crowded full, but it was full of water all spring."

* * * * *

Q. "Now, by Article 5, you are charged with having this drain ditch unnecessarily opened in March and April, and diverting so much water from the river that it

(Testimony of W. D. Hanley.)

lowered the river and deprived them of water. I wish you would state about that—March and April.

A. The drain ditch was watched very carefully last winter. The fact of it is, I commenced last fall on a plan to see, as far as the local use of irrigation and handling of water, in every way that I would make peace with the Pacific Live Stock Company, and if there were any way at all to get an understanding so that we would not have continually these little gnats of things, and especially to be rounded up here and set as a criminal, that I would do it; and I have continuously worked at it, even to the last moment, with Mr. Treadwell, at the Pacific Live Stock Company's ranch. And the boards in the drain ditch were kept so but very little water went out at it. Last winter when we were feeding—the winter was evenly cold last winter, and the ice froze the channel clear to the bottom of everything.

Q. Of the river, or the ditch?

A. Of the river and the ditch, too. So that we couldn't really keep the water off 31 or 27. And there was no raise in the water—it was just a matter of the ice freezing to the bottom and shutting the channel off. So we watched it very closely, and as soon as the spring came, and broke up the ice and the river cleared, I issued the orders positively to have the drain ditch closed up this year and kept closed up. Also to stop the breaks along the river. The water all has to go out of what is known as this river channel between where it enters 27 and the middle of 35, as the conditions were at the time of the decree. And in doing this I have suffered the

(Testimony of W. D. Hanley.)

greatest injustice, both on 27 and on 35, by being altogether over-watered and especially with the big levee that the company has built on the south side of 27, or on their north side of 34. And in that, I went so far as to counsel with you, Mr. C. E. S. Wood, to know this spring, what was the best way to proceed to relieve ourselves of that levee. And after consultation, amongst other things—I was going to Salt Lake, but I went via San Francisco, probably more than anything else, to consult with Mr. Treadwell, as it seemed to me to be so radically unjust that they would start water from out of this river channel, and try to run it west where there was more than a foot gravity, in a mile east, that the water positively could not get out without they put up this unreasonable levee, and forced the water back onto 27, in order to get gravity so that it would run out. But I still thought, if I had to give up a crop on 27, that I would do it to see if there were some peace with the Pacific Live Stock Company, after living with a disagreeable condition existing for more than 30 years. So I went to San Francisco, and Mr. Treadwell was out, and I called his office and a young man from his office came to the St. Francis Hotel and I gave him, in notes and oral statements, my message to Mr. Treadwell. After returning from Salt Lake, I received a letter from Mr. Treadwell, that Mr. Treadwell put in the record here—also the purport of my answer to him.

Q. Well, now, before you get too far away,—I am going into this question of the conversation with you and Mr. Treadwell later on. Before you get too far

(Testimony of W. D. Hanley.)

away from the drain ditch, which is what we are talking about now,—you said that you, by stopping the drain ditch, suffered a great injustice. As I understand the decree, you can use that drain ditch, at all times of the year, when it is necessary to keep you from being over-watered. Is that right?

A. Yes.

Q. Then I interpret your answer to mean—you can explain if I am wrong—that by stopping it, and trying to avoid trouble, you really over-watered your land?

A. Yes, sir.

Q. Instead of draining it off?

A. Yes, sir.

Q. And at what time was that?

A. Well, it was early in April, that I ordered these boards, and told them to haul manure, and such stuff as would actually stop all the water from going through the drain ditch.

Q. What is the engineering plan, or arrangement by which this drain ditch protects you from flooding?

A. The drain ditch was constructed by mutual agreement by Mr. Gilchrist and myself, about 1893; and the whole object of it was—the east side of the river, in 27 and 35 and 36, were all tule and flag marshes, excepting little high places, where some hay were cut; also on the west side of the river there was 34 and the lower part of 27 that is the south part of 27, were tules and flags—and the object of this drain ditch was to carry away this surplus water to Embree Slough, so as to make those lands productive of a good crop of wild grass hay.

(Testimony of W. D. Hanley.)

Q. How did it get hold of the water? Where was the intake?

A. The intake was from the river channel itself, and the theory of it was, to take it out of the river channel before it spread over the banks. The top of the bank of what is called this river, is practically level from there to below the middle line of 35, a mile and a quarter, there is not a variation in the real top of the bank of what is called this river channel; and as originally, at the time of the decree, which Judge Webster and Mr. Minor both said to me —

MR. TREADWELL: Just a moment, your Honor. This decree is not only here before the Court, but it has been construed by this Court, and it has been construed by the Circuit Court of Appeals. Now, are we going to go into outside evidence as to its meaning on this subject? The Court has said it doesn't mean what they claim.

MR. WOOD: Well, let that go. It is too far back, and as Mr. Treadwell says, the decree is written now. Let us stick to the proposition of what was intended by the drain ditch, and how it accomplished it.

Q. I understand you that it was, as you spoke of Foley Slough being an automatic safety valve, so this drain ditch was a safety valve to lower or to help carry off part of the flood of the river.

A. The excess water from the river. I would say that the difference in the change of that country that was effected by that, that that drain ditch really made a

(Testimony of W. D. Hanley.)

difference of 2,000 to 3,000 tons of hay in that location there.

Q. Then what water the drain ditch does take away, where does it deliver it?

A. It delivers it to the Embree Slough.

Q. Does the company get the benefit of it then?

A. Yes, sir.

Q. Now, you say you gave the orders early in April to stop the head of the drain ditch, and that you suffered in consequence? But how about the month of March—was there any necessity for you to use it for drainage purposes in March?

A. Well, it was very technical in the winter to do anything to keep the land from being flooded, on account of the water that were coming, what little water were coming, spreading all over our fields.

Q. Why —

A. So that we couldn't feed in them.

A. I know, but why did this water have a tendency to spread?

A. On account of the ice in the river channel.

Q. In the channel itself?

A. Yes, in the channel itself.

Q. In other words, there was what you might call an ice dam?

A. It was filled with ice. The channel was actually froze down.

COURT: Was that an unusual thing?

A. Yes, I would say it were, Judge. Last winter was evenly cold for a long period, and the ice froze ex-

(Testimony of W. D. Hanley.)

ceptionally deep. But this is practically no channel down through there—there is no gravity to it. It is no channel through there to speak of. If it were pretty well open, it would go through—the water would go through; but otherwise it takes but little to obstruct it.

COURT: Another season, when the ice is not frozen to the bottom of the channel, does it gorge when it breaks up?

A. Oh, no, it doesn't have current enough for that. It just simply lays there.

Q. Where is it you mean to say that the channel is so sluggish it takes very little to obstruct it?

A. Through 27 and 35.

Q. Yes. Now, how about this drain ditch head-gate being rotten and leaky? When was it built, or when was it rebuilt, if at all?

A. It was repaired last fall. I didn't only ride up to the gate a few times—it really looked in very bad order.

Q. Who did the repairing?

A. Mr. George McLaren and the McLaren boys under him.

Q. He is here, isn't he.

A. Yes, sir.

COURT: Under your direction?

A. Well, yes, under an order to repair the gate, put it in order.

Q. When was that done?

A. Last season.

(Testimony of W. D. Hanley.)

Q. Now, you are accused of making cuts in the river bank through 27, for the purpose of facilitating the slopping over of the river for your benefit on that section, and there are some photographs here, or at least one, which I think I showed you, with a pole stringer across the gap, and some perpendicular boards laid in. I wish you would state whether you cut any gaps in the river bank at all, or did anything to lower the level of the bank, so as to aid the water of the river getting out?

A. I have had a man upon Section 3 working on the river, with an assistant whenever he needed it, with special instructions to keep those gaps closed up; and when I went down with Mr. Treadwell, it was the first time that I had been down along the channel this season after the water came, and the water were coming out every place, and of course, there might be some little nicks where it would cut; but I have no knowledge of any such a place being on the river; and if it were, why, it was just because it had broken itself out. There is dikes built along there, and they are not really overly substantial, most of them, and when the water breaks through a couple of feet above the surface of the ground, and if it gets started once, those places cut out very quickly. If there were any place there, it certainly cut out. The man that was down there had full instructions to close them up, and I have brought him here as a witness.

Q. What do you mean by cut out? Cut out by your men, or by the action of the water?

A. Cut out by the water—by the water.

(Testimony of W. D. Hanley.)

Q. You say you gave instructions that the low places should be repaired or filled, and the water kept in the river as far as possible; but do you know whether they were carried out or not?

A. Well, this time that I went with Mr. Treadwell down there, and I know the river very well, it were in very good repair; it was an excessive amount of water, to have to go over the bank the way we have operated it ordinary years.

Q. Regardless of this year, and the strict language of this charge, have you ever sent out men, or given orders to have the natural bank of the river artificially cut into to let it out on your land?

A. No, sir.

COURT: Do you know of any cuts being made without your order?

A. Oh, no, there have been no cuts made by our people.

COURT: Or anybody else?

A. No, by nobody else. I do not think there have been any cuts made. If there is any cuts in there, they have washed out.

COURT: It is a wash?

A. Yes, the water goes out of there very swift.

Q. Now, there was something said by Mr. Griffing when he was on the stand that he saw shovel marks, or spade marks, on the edges of these cuts, showing that they had been artificially made. Do you know anything about that?

(Testimony of W. D. Hanley.)

A. Why, I don't know anything about it. If they were, it was probably made by the man that was in charge just stopping up those places. Probably the places that he put in went out; but I didn't have any personal knowledge of inspection.

Q. Now, why are you so, sure that you had it in your mind and gave the instructions that this bank was—even its natural depressions were to be kept tight? What was your reason for it?

A. Well, I came to Portland to consult with yourself and Judge Webster regarding this levee that was built south of the line of 27, and I suggested my plan that I would suffer most any injustice, if there could be a condition brought about, that even if we didn't agree upon the big principles of the case, these matters that we have litigated so thoroughly that we get down to an understanding, and operate them so they would be satisfactory.

Q. Well, it was like closing the head of your drain ditch, was it, in an effort to be overly careful?

A. Overly careful—overly friendly.

Q. I wish you would take up, the question of a new bridge—

COURT: Before you come to that, Colonel, I would like for him to explain the condition of that levee.

MR. WOOD: Yes, we will get down to their Section 34, just south of your Section 27, and explain the river conditions there, and especially in relation to the Orphan ditch and the levee.

(Testimony of W. D. Hanley.)

COURT: I want to know the height of the levee, and the condition of it.

A. I have been so rushed that I didn't get time to have a surveyor run over it; but I was there the day before—Saturday—and I was to come here Sunday, and I taken a couple of witnesses that are here, and went to the Orphan headgate. Now, we have all of the water shut out of the river onto land outside. It is on 21, on the west side of the river, and the water is all shut out of the river channel; and the water at the Orphan headgate, in the bottom of it was 12 inches deep, and the water at the other end of the ditch was just standing still—barely moving; that is, the west end of the ditch. This ditch is from the east line to the west line of 27—a mile long. The levee apparently is from four to five feet high, all the way through.

COURT: That is on the south side?

A. On the south side; and the lake of water above it, I would say covers 160 to 200 acres.

COURT: On Section 27?

A. 27.

COURT: I understood Mr. Gilchrist to say that the waters had rushed out this year so that at the present time, it was not of any use to hold the water.

A. Oh, the levee is in perfect repair. It is holding the water—it was the day before yesterday.

Q. Mr. Griffing has testified, if I remember correctly, that Mr. McLaren told him that all these gaps and breaks in the bank on 27 formed a regular part of your irrigation system. Is that true?

(Testimony of W. D. Hanley.)

A. The water running over the banks.

Q. I don't mean the natural flow of the river. What I meant to say was, the impression I got, at least, was that you stop and open these things, and just use them as you would check gates or head gates, as you would a part of your irrigation system.

A. No, we don't open them. We aim to use the river so it will work out evenly on the top of the banks and regulate the quantity of water that works over the bank.

Q. They produced this as apparently one of the parts of your irrigation system in one of those gaps. You will find a description of it on the back (Exhibit 15). Do you know anything about it?

A. No, sir; I haven't been on that bank, and stopping up the drain ditch—stopping up the drain ditch, this kind of a place might appear that way in the photograph and look like a big lot of water going out of it when really it is just nominal.

Q. You mean stopping the drain ditch might be so much water in the river?

A. Yes.

Q. This is not letting water out of the river—that is holding water in, isn't it?

A. That is attempting to hold it in. It looks like that it has broken out.

Q. The river is this side, isn't it?

A. Yes, the river is this side. It is on the east bank. I would like to state as far as any complaint of that is concerned, that I do feel it is an awful injustice, when

(Testimony of W. D. Hanley.)

they would come to a court, and make these complaints, when, if they would let us know that they were having so much feeling about it, we would a hundred times rather stop them.

Q. Right there, have you had any complaints in these matters yourself, at all, personally?

A. Not a word.

Q. Have you had any brought to you by your subordinates or employees?

A. Not a word.

Q. Now, there is a statement here that there was a board across one of the open sections of the 21 dam. I will state it is a little more definitely stated in the evidence that that board was about four feet long and six inches wide, and that there was also brush suffered to gather in the dam, so that it made an obstruction and raised the water above the 21 dam about a foot, and that all this happened in the months of March and April of this year. Do you personally know anything about that?

A. I was at the 21 dam last fall, and I wasn't there again until this spring.

Q. What time this spring?

A. In April, after these water cases came up.

Q. Which water cases?

A. Adjudication, the taking evidence.

Q. You mean out in the State Court?

A. Yes. And I went to the 21 dam, and went up along the line of the 21 ditch. That is on the west side of the river, a little ditch leading right down along the bank of the river. And I was surprised when I got up there,

(Testimony of W. D. Hanley.)

that even this little manure level that had been hauled across there, that it hadn't been taken out so the water could run out in 21. And then I went onto the dam. Judge Webster was with me, and he says that "Those people are complaining about some willows being in there," and said there was a board or two in there. I went and I didn't see any board. There were some little willows on top of the water. The water breaks with the current—the 21 dam is probably two feet higher than the level of the river, and it breaks away with the current. These little willows was laying right on top of the water, which couldn't hardly be classed as an obstruction, but I gave Mr. McLaren and Mr. Sterling orders to see that they were taken out.

Q. Now, would these willows that you saw, or the obstruction that you saw, raise the river level a foot?

A. No, they wouldn't raise it at all.

Q. What time was this you saw it with Webster?

A. Why, I should judge, about the 20th of April.

Q. And that was the first you had seen it yourself, or the first you had heard of it, was it?

A. Yes, sir. Yes.

Q. Now, it says that, during the months of March and April, by means of this brush, and the boards, the water of the river was raised at least a foot higher than the floor of the dam—by means of the brush and the board—and was diverted into the Hanley upper ditch to a greater extent than 40 cubic feet a second.

A. No, that is not true. It didn't divert any water. In fact, why, we would have—if this little trash would

(Testimony of W. D. Hanley.)

have been taken out of the head of 21 ditch, it would have been carrying onto 21, which had been dry all spring, I would say anywheres from five to 20 second feet. We haven't been technical to the use of the water in all those little details; but we haven't taken out the water at that place there that naturally would have run out, if we would have been technical about trying to get it out.

Q. Has this dam 21, in common with all the other dams as I understand the usual custom of construction there, a tie-board or string board nailed across it, which is higher than the floor of the dam?

A. Yes, it has a board across that is higher than the floor of the dam.

Q. So that would raise the river, wouldn't it?

A. Yes.

Q. Now, getting back to the original information, in order to cover the particular details of the information, I am going to run over to you these cuts: In the left bank of the east fork, the left bank of the east fork of Silvies river, 900 feet below the Hanley drain ditch, a cut 12 feet wide and 3 feet deep. Did you have any such cut made, or order any such artificial cut there at all, artificially made?

A. Where is that at?

Q. 900 feet below the Hanley drain ditch on the left bank of the river.

A. Which way was the fellow going?

Q. All this is downward. The east bank, that would be.

(Testimony of W. D. Hanley.)

A. East bank?

Q. East bank of the east fork.

A. Well, there is cuts in the river——

Q. Now, I want to distinguish between artificial cuts and cuts by the water. Which do you mean?

A. Oh, there is no cut in there only by the water. Those cuts are the original cuts that were in there when I first came to the country. I cut hay on 27. I cut hay on 27 in 1882 and '83. Those cuts were in there then.

Q. Now, on the same bank of the river, the left bank going downstream, the east bank too —

A. I think they are in repair.

Q. About 1,000 feet—I don't care if they are in repair, I don't care if the whole river goes out there. The question is whether you made them.

A. No.

Q. Or suffered them to be made.

A. No.

Q. Or whether they are artificial cuts.

A. No.

Q. That is what I am driving at. I don't care anything about the capacity of water. I want to know whether they are artificially made cuts. Then about 1000 feet above—I suppose that would be to the north of the south line of Section 27, township 23 south, range 31 east, another cut about 12 feet wide.

A. Which side of the river?

Q. Left bank, east side, a thousand feet above the south line of Section 27.

A. We have no cut in there."

(Testimony of W. D. Hanley.)

* * * * *

“Q. Now, that suggests a point in Mr. Treadwell’s testimony, that he had a talk with you, in which he mentioned the 31 dam, which they call the Luig dam, the Young dam and the People’s ditch, and that you said something to the effect “Take it from me, I am responsible for all of these.” Is that so?

A. I have a little personal hesitancy in testifying on a direct question that disputes Mr. Treadwell, and especially, when I were trying to make an alignment that we talked about things in a different way than I ought to testify about them; but I only want to say that Mr. Treadwell did misunderstand me. I only meant the 31 dam. The 31 dam, I meant to convey to Mr. Treadwell that I were responsible for the boards being in it; that I had instructed Mr. Thornburg to put them in, and that I were responsible for that. Now, when I met Mr. Treadwell there on Sunday we went over to their office, and talked, and Mr. Treadwell seemed to be pretty well stirred up, and he told me about the water on the east river being out at all these places.

Q. Do you mean the east river?

A. On the west river, the west river. And he says; after I had told him that I were responsible for it, he says: “You take them out, and then I will tell you afterwards whether I will sue you or not.” And I said to Mr. Treadwell well: “I wish you would withdraw that statement, because we have been litigating long enough. You ought to understand there is no use for to try to bluff one another, nor to try to make any assertions, but I

(Testimony of W. D. Hanley.)

have started out this year to see if I can get along with the Pacific Live Stock Company, and I am willing to go clear down the line to do anything to see if we can arrange a truce that we can get along. And you understand that I have to go with these parties to the P. Ranch today, and I will get back here tomorrow about noon, or as close as I can get back."

Q. What day of the week was this?

A. That was Sunday, and I would get back Monday, and then I said: "Mr. Treadwell, I will go down along that river with you, and see. I don't care about a little gnat of water, or anything. I want to see if we can work something up that we can get along for a truce to work out this common irrigation with." And Mr. Treadwell replied to me, he said: "I am going to Burns now to consult with Mr. Gilchrist, but I will let you know after you get back." When I got back —

Q. When was that—how long a time?

A. That was Monday—Monday afternoon. And I seen Mr. Treadwell on the street, and he made the remark about as he said it, as near as I could say, but indicating to me that he had seen that the dam on 31 was torn out, and that the suit was begun.

Q. Now, where was this conversation, the first one, I mean, in which Mr. Treadwell said "You go and take them out, and after that I will tell you what I will do, or whether I will sue you or not."

A. That was at the Pacific Live Stock Company's ranch at the island. Now, Mr. Treadwell raised the subject on their land case, and he said: "You ought to help

(Testimony of W. D. Hanley.)

us." And then I said to Mr. Treadwell, I said: "Mr. Treadwell, this is the first time that I have been on this ranch for 20 years, by invitation, and I never have had any alliance or no common friendship with the Pacific Livestock Company, but I want to say to you that I am no party to these cases. I don't know anything about it, further than I have seen in the papers, and I think you are making a big mistake to make an assertion of that kind, because I don't know as if you understand my feelings, but I am not an agitator that caused this case to be brought, and I don't know where to take hold to help you, nor where to take hold to hurt you, because I don't really feel as if I have any acquaintance with you that would put me in a position to know what to do when you speak that I could help you." Well, he said: "You bet you could help us." And then this other conversation followed on the condition on the west river.

Q. Well, now, Mr. Treadwell testified about driving down with you along through Section 27, into 34 and 35, to the Orphan headgate.

A. Yes.

Q. If I remember correctly, I got the impression that in that conversation, he called your attention, in a general way to other things than the 31 dam, the flooding of the water on 27 and so on.

A. Yes, he did. Mr. Treadwell stated, he said that Mr. Corcoran may come down there, and said: "You ought to get that water off 27." And I looked at him and laughed. I said: "Mr. Treadwell, it is perfectly ridiculous for me to talk about getting it off." I said:

(Testimony of W. D. Hanley.)

"I have no way to get it off. That levee there is the only way to get it off." I said: "I can't get it off."

Q. And whose levee was that?

A. That was their levee.

Q. Now, what I want to get at, and I will suggest it somewhat—you have said you had no complaint made to you, no request to clear these things up except this talk with Mr. Treadwell about 31; that you didn't know of these things complained of in the contempt; and I want to know if this conversation with Mr. Treadwell brought to your mind any understanding that he was complaining of these definite things stated in the contempt proceeding.

A. Not a thing. Mr. Treadwell and myself, the first Sunday that we went—that was a week before that we were at the Island Ranch, we went from the Belle A Ranch down the river, and I was showing Mr. Treadwell all the conditions there, showing him how the water ran over the banks of the river, explained to him that it all had to come out before it got on down below; and we stood on the—we stood on the Orphan headgate, the bank that is banked up there, and Mr. Treadwell said to me: "Mr. Hanley, now," he said, "We want to get along with you. If you will suggest to me any comprehensive plan of building canals, if you will submit it to me, I will try and see if we cannot work it out." Well, now, I said: "Here, Mr. Treadwell, we are both full-grown, and just as well commence right now." I said: "In the first place, the water will run on every north and south line, and every line east, the water will all run south,

(Testimony of W. D. Hanley.)

and it will run east on every section. Now, your Orphan headgate and your levee is running against the grade of the country. It is going the other way. The question of working out this little condition here isn't anything. But now," I said, "Just stop right here and let us look right down below the Orphan headgate. Let us commence at that first. Let us see if we can get along on these things that is bothering us right now, and then work out from that. Now," I said: "This channel ought to be opened—it ought to be opened clear down on the line between 35 and 34. I want to say to you"—and I want to say to this court—"that I am willing to do that any time as soon as the water dries down, I will do it any time." The only thing I do want the protection of the rights that belongs to those sections. The right of way for that was made out in 1893 by agreement with Mr. Gilchrest, and we went and mowed it out and got ready for it, and the company never come—never come to join us to put it in. All of the fall of 1893, we were ready to put it in.

Q. You mean you were willing to open up this channel spoken of by Mr. Gilchrest—you are willing to make the physical improvement, but you don't want to lose your legal rights for lands acquired subsequent to the decree?

A. Or I want the conditions of the decree amended so that I hold my rights to irrigate these lands. The whole country in that overflowed country needs drainage worse than anything else.

(Testimony of W. D. Hanley.)

Q. What do you mean by you want the conditions of the decree amended?

A. So that I would retain my rights to irrigate after I had helped to put in this canal to drain it, I want to retain my rights to irrigate it.

A. Yes. Well, what did Mr. Treadwell say to that?

A. Well, Mr. Treadwell said to pass that along. Now I said, "Mr. Treadwell, how far will you go with the development of this country?" He says: "I will go to the extent of canals to develop our lands." Well, I said: "All right, I will go along with you, but" I said, "I want to go even farther than that. There is no use to complain about flood waters and the conditoinis of flood waters, when they break loose themselves, and come puring down onto the country, that we cannot handle them"—I said, "I will go so far as to put my land in to construct reservoirs to hold these flood waters back." Mr. Treadwell said to me: "We don't want any reservoirs." So then we went back, and talked about other matters. And then we had another talk at my office, and I said to him: "Now, Mr. Treadwell, we have made the trip, and we have talked about all of these things, and we haven't settled anything. Now, what about this Orphan Headgate and the condition there? The Orphan Headgate being opened, it does rob me of my rights to irrigate those lands down below."

Q. You mean that the Orphan Headgate being

(Testimony of W. D. Hanley.)

open and diverting water gives you a different wrong than the levee backing the water up on 27?

A. Well, that leaves the chance for water to get down below first; then of course, the levee backs the water up on 27.

Q. They are two different things?

A. They are two different things, but both of them are in effect a damage to me.

Q. Then you can go ahead and state what you were going to, I just wanted to get it straight.

A. When we got back up to the office, that was really what we talked about, was relieving the levee, and closing up the Orphan Headgate.

Q. In what way does the diversion of the river at the Orphan Headgate hurt you?

A. It takes all of the water out of the little remnant of the channel that forces it over 35 and water for the Fennimore dam at 3.

Q. What times were you personally present up in Harney Valley this spring during the months of March and April?

A. I was in Harney Valley practically all of April, and March, I think, maybe.

Q. If counsel have no objection, to my refreshing your memory, I don't think you could have been there all of March. Wasn't it March you came down to see me, and went on to Salt Lake City?

A. Oh, yes, that was in March.

Q. About what time in March was that?

A. Why, I would have to look up something?

(Testimony of W. D. Hanley.)

Q. It would be pretty close to the date of Mr. Treadwell's letter, would it?

A. No. No, it would be some earlier than that, but pretty close to it. I know that I had went to San Francisco, and Salt Lake, and got back home before I received his letter. And I am not able to state from memory whether the letter came in the mail after I got home, or whether it was waiting for me when I did get back to the Belle A Ranch.

Q. Just before we get too far away from it—I think you spoke of the Fennimore Dam, or the Fennimore property. What is the description of that property?

A. The south half of the northwest quarter.

Q. As the river runs, that is below the Orphan Headgate?

MR. TREADWELL: Section 2, isn't it? The dam is not on the Fennimore property at all, as I understand it.

Q. What property is the Fennimore property itself? Did you describe that?

A. Section 3, in 24-31.

Q. Section 3, in 24-31?

MR. TREADWELL: 2, isn't it?

COURT: Section 2 or 3?

A. 3. But the Fennimore place is in 2. We call the place there as Fennimore—known as the Fennimore house.

COURT: Which Hanley place do you call that—the Fennimore place?

(Testimony of W. D. Hanley.)

A. Yes.

COURT: Section 3?

A. Section 3.

Q. Where is the dam itself? The dam is on different property, isn't it?

A. The dam is on the northeast corner of 3.

A. And this is how far below the Orphan Headgate?

A. A mile.

CROSS EXAMINATION.

Questions by Mr. Treadwell.

Mr. Hanley, referring to this dam that we call the Luig dam, you know that in the final decree in this case, it is stated that Mr. Luig owns the dam in Section 31, which he is permitted to maintain at certain times, and prohibited from maintaining at any other time, do you not?

A. Why, I didn't know it.

Q. Haven't you almost been sleeping with that decree for the last 10 or 12 years, Mr. Hanley?

A. No, sir, Mr. Treadwell. There is where you are wrong.

Q. Well, I must confess that it looks that way.

A. No, sir, I have not.

Q. You say you never have seen it?

A. I have seen it.

Q. You never have read the decree at all, have you, or taken any notice of it?

(Testimony of W. D. Hanley.)

A. I have read the decree.

Q. You don't care very much about it one way or the other?

A. Well, I aim to respect my part of it, Mr. Treadwell.

Q. Have you ever taken the trouble to read it, Mr. Hanley, or not?

A. Yes, I have read it, Mr. Treadwell.

Q. When did you first learn, Mr. Hanley, that there was a provision in that decree that Mr. Luig could have that dam and maintain it at certain times only?

A. Well, I were not a party to that, Mr. Treadwell, and that never was Mr. Luig's dam.

Q. I am not asking you that. I am asking you when you first knew that that provision was in that decree.

A. Well, I would say directly it had never been brought to my attention until this contempt case came up.

Q. Never been brought to your attention at all until this contempt commenced. Mr. Hanley, you put in an answer when that case was brought against you, didn't you?

A. Yes.

Q. And you set up that you owned a dam known as the 21 dam, did you not?

A. Yes.

Q. You set up that you had a ditch there, and probably two ditches, did you not?

A. Yes.

(Testimony of W. D. Hanley.)

Q. And you didn't set up that you owned this dam in Section 31, did you?

A. No, I didn't own 31.

Q. I am not asking you that. I am asking you if you set up that you owned the dam in Section 31 in your answer in this case.

A. 31 dam was never in this case.

Q. We will come to that, Mr. Hanley. I am asking you if you set up in your answer in this case, that you owned the 31 dam when you put your answer in in this case?

A. Well, I don't think that is a fair question, Mr. Treadwell. The record itself will show that.

Q. And you couldn't say, then, without reading the record, whether you did or you didn't? Is that the idea?

A. Well, I will say this: that in the wind-up of this decree, that Mr. Minor himself—

MR. TREADWELL: Now, I object to this, your Honor—attempting to state anything that Mr. Minor said. It is hard enough for one attorney to have to testify in this case.

COURT: Just testify, Mr. Hanley.

Q. Are you unable to state, without looking at the record, whether in your case, and in your answer, you set up that you owned the dam in Section 31, or any dam in Section 31?

A. I wouldn't answer that question, Mr. Treadwell, without the record.

(Testimony of W. D. Hanley.)

Q. You wouldn't answer. You do know, Mr. Hanley, that you agreed to the part of the decree which you say affected you? You know that much, don't you?

A. Well, now, Mr. Treadwell, it was not a decree—it was an agreement.

Q. You entered into a stipulation in this case, didn't you?

A. And it was understood it was an agreement.

Q. Wait a minute. You entered into a stipulation in this case, didn't you? Is that right?

A. I think so, yes.

Q. And it provided that a decree should be entered, did it not?

A. Well, it did not provide that it was a decree.

Q. Didn't it provide that a decree would be entered in the case on that stipulation?

A. It was an agreement.

Q. Will you answer that question?

MR. WOOD: I think you are asking him legal questions. Evidently his counsel handled it.

COURT: Wouldn't the stipulation show for itself, Mr. Treadwell?

MR. TREADELL: Yes.

MR. WOOD: Yes.

MR. TREADWELL: I will leave the question where it stands. It is satisfactory.

Q. You knew the decree was entered, did you not?

(Testimony of W. D. Hanley.)

A. Well, I have had two or three very severe notices served on me since that it was.

Q. Well, then, you knew that it was entered?

A. Yes, sure.

Q. You have read it, have you not?

A. I say that I have read it.

Q. You know that it embodies the stipulation that was entered into on your behalf, do you not? You know that, don't you, Mr. Hanley?

A. In regard to the 21 dam?

Q. Yes, regarding the 21 dam.

A. Yes.

A. You know that stipulations says that decree may be entered against you, enjoining you from, in any way, shape or manner, obstructing the east fork or the west fork of Silvies River, except by your 21 dam, and the 21 ditch, do you not?

A. Well, Mr. Treadwell, now, I am not under the impression that it barred all my rights for the balance of my natural lifetime.

Q. I am not talking about what effect it had from a legal standpoint.

A. My understanding is from the standpoint of a citizen that lives in the country, that interprets things as he understands them, without having learned technical knowledge that there is certain things that I have agreed to that bound me on the 21 dam, on the 21 ditch, and the upper Hanley ditch, and the drain ditch, etc.

Q. Well, now—

(Testimony of W. D. Hanley.)

MR. WOOD: I want Mr. Treadwell to get everything that he wants during his stay here, but it seems to me it is asking this man to legally determine the meaning of a written decree and stipulation.

MR. TREADWELL: No, I don't care for that. I don't care for him to interpret it at all. He is trying to interpret it.

MR. WOOD: I would be glad to have Mr. Hanley interpret it, if the court will permit.

MR. TREADWELL: I don't think his interpretation would help us any.

Q. When was the time you first got the control of this dam in 31?

A. I think in 1898.

Q. And Mr. Luig was also using it then, was he?

A. Mr. Luig assisted me in putting it in.

Q. That was the first you had anything to do with it, when you put in this particular dam?

A. We were re-putting in a dam which was above, known as the old Stenger dam, which was specially the 31 dam.

Q. You put in a dam, as I understand it, at the very point where this dam is now, in Section 31, in 1898? Is that what I understand you to mean?

A. In 1898. I say that from memory.

Q. You say there had been an older dam at some other point?

A. Yes.

Q. Where was that?

(Testimony of W. D. Hanley.)

A. It was above.

Q. How far above?

A. Oh, a quarter of a mile.

Q. A quarter of a mile?

A. Between a quarter and a half, probably.

Q. That would be up very close—it is in the same section?

A. All in the same section, yes.

Q. That had washed out, had it, or what?

A. Washed out.

Q. And which Mr. Luig helped you put this dam in, or which Mr. Luig did you help put it in, whichever it was?

A. Casper and Henry.

Q. They both worked on it, did they?

A. Partially.

Q. Had they had anything to do with the Stenger dam before that?

A. I don't know as they had.

Q. Your understanding was that they had not, as I understand it?

A. Well, I would say that probably they had, and probably they had not.

Q. How did they come to help you, or how did you come to help them, whichever it was?

A. At our own initiative, and suggestion that we put it in. I think that Casper Luig that year rented the northeast quarter of Section 28, and he was rather a frequent visitor at the Belle-A Ranch, and we put it in that spring temporarily.

(Testimony of W. D. Hanley.)

Q. You understood that he claimed a right there to the whole dam?

A. Yes, I understand that he has a right there.

MR. WOOD: You are talking about the old Stenger dam now?

A. Well—

MR. WOOD: He is talking about the old Stenger dam.

A. I would put that more this way: that pretty near any of the neighbors that wanted a right, or an interest in any of those things, why, they could always have them.

Q. Was there any dam at this point where this new dam was put in, at the time you put it in?

A. No, there was no dam there then.

Q. Didn't you say in the opening of your testimony—

A. I don't know, Mr. Treadwell but what maybe the first dam that we put in was higher up than where the present one is. I wouldn't be right sure.

Q. Have you rebuilt it since?

A. Yes.

Q. When did you rebuild it?

A. I think probably the second year after we put it in.

Q. What year do you think that would be—about 1900?

A. 1899.

(Testimony of W. D. Hanley.)

Q. Well, didn't you say in your opening testimony that Mr. Luig had no interest in this dam until 1900?

A. Well, I don't know, Mr. Treadwell, but Mr. Luig only has a neighbor's right in it. That dam belongs to Section 31.

Q. Well, I am asking you what you testified to. Didn't you testify, when you started off your testimony, about this Luig dam, that Mr. Luig's interest in that dam dated from 1900?

A. Well, I think Mr. Luig's interest in it dates earlier than that, because whenever we did do the first work, why, he had an interest in it.

Q. You also think that he had an interest before you did the first work, in the old dam that you were replacing?

A. Oh, no. That dam serves two sections, you know. 31 and 5 is served from that dam.

Q. At any rate, your statement here that his first interest was in 1900 is not right? Is that right?

A. Well, I wouldn't say that, Mr. Treadwell. Whenever we done the first work together, Mr. Luig had a neighbor's interest in that dam.

Q. When did you rebuild it again, if you have rebuilt it since?

A. No, no.

Q. So it was there in 1898? Then you rebuilt it again in 1899 or 1900? Is that as I understand?

A. Somewhere along there. I may be a year behind on my first statement.

Q. You know, don't you that Mr. Luig all this

(Testimony of W. D. Hanley.)

time has been operating this dam under this decree, ever since that?

A. No, Mr. Luig has not.

Q. He has not?

A. No.

Q. Mr. Luig has never touched the dam, I suppose?

A. Oh, he probably has.

Q. He probably has, or probably hasn't—which is it?

A. We haven't been restricted with this dam, and we haven't had any special time of putting it in. This dam has been put in by us, whenever we wanted to put it in.

Q. You mean to say, Mr. Hanley, that ever since this decree has been entered, you have absolutely disregarded the decree as to this Luig dam?

A. Every year, Mr. Treadwell.

Q. Every year?

A. Every year.

Q. You just simply and absolutely disregarded the decree altogether?

A. Every year that dam has been put in by us, and it has had no care about dates. Now, it might have went some years way over—I don't know—because I have never given an order that this dam was under the decree at all.

Q. What land did it irrigate since that time?

A. 31 and 5. Now, I think to clear this thing up a little—

(Testimony of W. D. Hanley.)

Q. You can't clear it up with me, Mr. Hanley, the least bit, except by answering my question.

A. Maybe I can with the Court, Mr. Treadwell. I have a reason for disregarding that. I have a reason for disregarding it.

Q. I am asking you this question, Mr. Hanley: It irrigated the lower part of Section 31, and Section 6, did it not? Isn't that a fact?

A. Yes.

Q. And Section 5?

A. Yes.

Q. You also own Section 5, don't you?

A. Yes.

Q. We will come to that in a moment. Now, this dam is in very low, away down in the lower part of Section 31, is it not?

A. Pretty well down, yes.

Q. About how much of Section 31 does the water that floods out from that dam irrigate?

A. Oh, that dam affects 31 two-thirds of the way up.

Q. Who operated the dam since the decree in this case? Who put the boards in?

A. Well, I wouldn't want to go back further than Mr. Thornburg, without giving it a little special thought.

Q. How long has Mr. Thornburg been employed by you there?

A. I would say just off-hand, about four years.

Q. About four years. And before that did you have anything to do with it at all?

(Testimony of W. D. Hanley.)

A. Oh, yes.

Q. Well, who operated the dam then?

A. I will try to work up that detail, if I will be given a little time.

Q. You can't work it up better than right now, for me, Mr. Hanley.

A. Well, I haven't got it.

Q. Have you ever put those boards in that dam before this year yourself, outside of the time permitted by the decree?

A. Well, now, Mr. Treadwell, I will tell you. It has been a long time since I put in any boards, or did any such work.

Q. Well, you can answer that yes or no. We will get the rest of it.

MR. WOOD: You mean with his own hands.

MR. TREADWELL: We will get to that.

A. I would say no.

Q. Have you ever been there and ordered it done before this year?

A. Yes.

Q. Now, what year did you do that?

A. You mean right at the dam?

Q. Yes.

A. Right at the dam?

Q. Yes, or that you know that the boards were put in at any time when it was not permitted by this decree?

A. Well, I don't know, Mr. Treadwell, that I can state any specific time. I have given an order on this dam that is regardless of any decree.

(Testimony of W. D. Hanley.)

Q. You specifically told your people to disregard the decree so far as that dam was concerned?

A. No, I have not, no, sir.

Q. I want to know what you mean.

A. No, sir.

Q. What did you tell them?

A. The only object in putting it in would be if we need water.

Q. What you are telling the court is that that dam has been used every year during the time that it was prohibited specifically by the decree in this case.

A. Well, that dam has been used every year, Mr. Treadwell—every year since the decree, and before.

Q. Why, sure. We all know that, Mr. Hanley.

COURT: That is again indefinite. I should think the time—

MR. TREADWELL: Yes, the time is the whole thing.

Q. There is no question about this dam being used, Mr. Hanley, every year. I am asking you, has this dam been used before the time the decree permitted it to be used, on the 12th of May or the 15th of May, I believe it is, by this decree? That is what I am asking you.

A. Well, I am not prepared to state right now, Mr. Treadwell, but I will say this to make it plain, that I did order the boards put in this year.

Q. I know you did this year.

A. Yes.

(Testimony of W. D. Hanley.)

Q. But outside of this year, you wouldn't say that anybody violated this decree in regard to that dam?

A. Oh, my, yes.

Q. You would?

A. Yes.

Q. Well, now, who?

A. The violation, if it was not technical, it was in other way that we have been under the impression—that I have personally been under the impression, and would give an order any time that we would put in the boards in the dam any time that we wanted water.

Q. I am asking you the question: Can you state any person that ever put the boards in that dam before the time permitted by the terms of that decree, excepting this year?

A. Well, I won't state it now, Mr. Treadwell.

Q. You can't state it now, can you?

A. No, sir.

Q. Now, in regard to this Young dam, when was it that you made this trade with Mr. Young, in regard to your interest in this dam, or the old dam?

A. I think about two years ago.

Q. Now, you remember when Mr. Young was over here and charged with contempt, you heard about the matter in a general way, did you?

A. Well, I know about it in a general way.

Q. There was considerable publicity given to it, was there not?

A. Well, I don't know as there was.

Q. You didn't think there was?

(Testimony of W. D. Hanley.)

A. No.

Q. You didn't? You know about it, however, didn't you?

A. I will say I knew about it.

Q. Yes. And the same charges were made when he was brought over here, that it was an outrage to cite the poor settler for contempt that you have made at this time, were they not?

A. Oh, I think it is, Mr. Treadwell. I think it is perfectly ridiculous.

Q. Well, you think so, and you said so at that time, didn't you?

A. Yes.

Q. Notwithstanding the Judge held he was in contempt, you still think so? That is right, isn't it?

A. Well, I feel that question as a man that lives down there in the country, I feel that.

Q. Yes, I understand. It was after that and after he told you that he had been enjoined from maintaining that dam that you made a change of some hay or something of that kind, and bought it from him? Is that what I understand you to mean?

A. Yes.

Q. Now, if Mr. Young testified in this court when he was over here on the contempt matter, that he built that, and that you had an interest in it before that, it is not so at all, is it?

A. I wouldn't say so. I wouldn't say so.

Q. That was the first interest you got in it, when you bought it at this time from him?

(Testimony of W. D. Hanley.)

A. Well, that was the first time I got all the interest in it, I would say that originally there was a ditch running cater-cornering across bearing south across 29. Mr. Young had it under lease at that time.

Q. Well, now, let us come to that. Take this old Young dam. That was down the river quite a ways below the present one, was it not?

A. Yes, some.

Q. You say there was something built in the bottom of that. How high a plank was put in the bottom of it?

A. Well, I wouldn't go into technical detail as to the old dam, but I know that the old dam, the bottom of it was above the bottom of the river.

Q. Well, about how much? How high a plank do you say was put in there?

A. Well, I would say that it takes practically a foot to make a good showing that it is higher. Say a foot.

Q. Now, isn't it a fact, Mr. Hanley, that several years ago we came into this court and charged that Mr. Young was taking out more water than he needed for the land that he was permitted to irrigate by this decree, and that he did it so as to force it over onto your Section 29 and give you the benefit of it, which was not entitled to it; and didn't you in this court swear that you never got any of that water, and that that was all false? Didn't you so testify, Mr. Hanley?

A. Well, you say I did.

Q. Well, didn't you?

A. Well, I would like to see the record.

(Testimony of W. D. Hanley.)

Q. You wouldn't be able, then, to state whether you did so testify or didn't so testify until you saw the record? Is that correct?

A. Yes.

COURT: Is the bottom of the old dam there now so you can tell?

A. Well, I haven't been down to it lately. I wouldn't say whether it were or not, Judge, but there is evidently signs there that it is easy to tell where water runs.

Q. You stated, Mr. Hanley, as I understood you, that you went to the Young dam a few days ago. Is that so?

A. Yes.

Q. Did you look at the river below that dam?

A. Yes.

Q. Did you notice how far the river was below the banks at that point?

A. Why, yes, in a general way. I didn't meter it.

Q. Well, how far was the water below the banks?

A. Above or below the dam.

Q. Below the dam.

A. Oh, I should judge three and a half feet, maybe, four feet.

Q. Below the banks of the river?

A. Yes.

Q. That is about right?

A. I would say probably about three feet above, may be.

(Testimony of W. D. Hanley.)

Q. Three feet below the banks?

A. Yes.

Q. So when you stated to the court that the river was bank full, you were evidently thinking about the condition down on your land, and not at the Young dam? That is correct, is it?

A. Well, I didn't say that the river, that any water was running over the banks at the Young dam.

Q. No, but you did say that you went to the Young dam, and that the dam was having absolutely no effect on throwing the water out through the ditch, because the river was bank full anyhow, didn't you. Didn't you state that to the Judge?

A. Mr. Treadwell, the ditch there, or the bank of the river there, probably is three feet higher. I didn't go up and examine the Hotchkiss ditch. I didn't examine the Hotchkiss ditch, but I would say that a ditch in there and onto that road would draw the water out of that river above the dam.

Q. The one above the dam?

A. Yes.

Q. When the dam is there?

A. Yes.

Q. And the higher you raise that dam, the more water it puts out then, doesn't it?

A. Yes.

Q. And the sooner it will put water out, too.

A. Yes.

Q. So that the dam is a very material proposition in putting water out there, isn't it?

(Testimony of W. D. Hanley.)

A. Well, I don't think it makes much difference if a fellow doesn't take it out.

Q. You don't think it makes much difference if he don't take it out?

A. No.

Q. At the time you were there, he wasn't taking it out? Is that the condition, or not? Or was he still taking it out, notwithstanding we have brought this contempt proceeding?

A. I didn't examine the Hotchkiss ditch. There was water in the road at the Hotchkiss place.

Q. On both sides of it?

A. Both sides of it. If there were water on one side, there would have to be on the other. There is a culvert through there,—it would level up.

Q. So he was taking water out, as far as you know?

A. Well, the water may have come from some other place.

Q. Well, now, come back to what I am asking you. I am asking you, didn't you tell the court that the dam could not have any effect because the river was running bank full there anyhow, and it couldn't make any difference? Didn't you so testify in answer to Mr. Wood?

A. Why, you could take water out on the east side.

Q. Just answer that question yes or no, please.

COURT: Do you remember whether you did or not?

A. No. I don't want to be understood in saying that the water was running over the banks of the river

(Testimony of W. D. Hanley.)

at the Young dam. I don't want to be understood as saying it was running over the banks at the Young dam, or was up to the tops of the banks.

Q. Now, as I understand it, this statement in your affidavit is entirely unfounded where you state that until yesterday, the 29th of April, 1915, when the complaint was served upon you in Portland, Oregon, you had no knowledge of the George W. Young contempt proceeding, or that he had been ordered to remove said dam, or purge himself of contempt by paying costs? That is not so at all, is it, that portion of your affidavit?

A. It is not so.

Q. No, I say that is not true there? You don't contend it to be, do you?

A. I want to be understood as saying that I did understand that Young was held for contempt of court.

Q. I just want to get the record clear. You state now that that is not right?

COURT: I understand now you made a mistake in that affidavit.

A. Yes, sir; in the allegation, I didn't aim to say that I had no knowledge of the Young contempt.

Q. Now, Mr. Hanley, you have a tenant on 29, haven't you?

A. Yes.

Q. He is growing grain, is he not?

A. Yes.

Q. It is true that you told me that you told him to use the Young dam to get water over there?

A. Yes.

(Testimony of W. D. Hanley.)

Q. So that when you stated here in the affidavit that you hadn't used it, and you hadn't incited anybody to use it, and you didn't know it had been used this year—

A. Well, it hadn't been, Mr. Treadwell. It hasn't been.

Q. You told him to go and get it, but he wasn't able to get it. Is that the idea?

A. Oh, no. He doesn't need water now. He probably won't need water for a month. He has got plenty of water for the present. All that he will need will be just a little bit of water to run under his sod to develop his grain, and that probably won't be for another month that he will want it at all."

* * * * *

"Q. Whom did you get the land from?

COURT: Is that 31?

MR. TREADWELL: Section 5.

A. Section 5. From Mr. Wood. It came through Charles Altschul.

Q. He had got it from the Road Company?

A. Yes.

Q. Got a contract?

A. Yes.

Q. The contract was assigned to you?

A. Yes, to the William Hanley Company.

Q. You are president of the William Hanley Company, as I understand?

A. I am a stockholder in the company.

(Testimony of W . D. Hanley.)

Q. You transferred all the property that you owned at the time of this decree, that is described in the decree, to the William Hanley Company, did you not?

A. It is the successor, the William Hanley Company. I think it was in another company first. I think that the William Hanley Company is the final successor of it. There is another transfer in there."

* * * * *

"Q. Now, Mr. Hanley, you stated in your direct examination that on the east fork all the water had to be taken out of the river, before it got down to the channel between 34 and 35. What did you mean by that?

A. Why, do you have reference to the water in 27 and the drain ditch?

Q. Yes, sir.

A. The drain ditch gate is operated to reduce the quantity of water in the river, and it was built for that purpose, of reducing the quantity in the river, and taking it away. The river itself was the distributing system of irrigation.

Q. So your object has been, by one method or another, to take all the water out of the river before it gets down to the channel between 34 and 35?

A. Why, now, Mr. Treadwell, I wouldn't want to say to the court here on this proceeding that I have looked technically and carefully after the drain ditch as to all periods and all conditions; but my general instruction has been, and you people were a party to help construct that ditch, and you never have made any com-

(Testimony of W . D. Hanley.)

plaint to me on the ground—I never know of anything only when it comes into court—as Mr. Newman says that he worked up there and put in some boards, or took out some boards; and if that hadn't been used satisfactorily to you, I know it is your own fault. The other time you brought me in here because I left it open. This time you bring me in here because I shut it up.

Q. Well, now, when did we bring you in here because you shut it up, Mr. Hanley?

A. Right now.

Q. Right now?

A. Right now. And I took you out there and showed you that I did shut it up.

Q. As I understand your testimony, then, your understanding is that we are charging you in this proceeding with shutting up the drain ditch?

A. The drain ditch.

Q. That is your understanding of this proceeding?

A. That is my understanding of one of the many things you are charging me with.

Q. The affidavit complains that you had the drain ditch open diverting something like 40 feet of water during March and the great part of April. Do you know that?

A. Now, Mr. Treadwell—

Q. Do you know it, or don't you?

A. I don't know it. I know what my orders were.

Q. I suppose then, you haven't read the affidavit of contempt in this matter, on which the contempt is based?

(Testimony of W . D. Hanley.)

A. Yes, I have read it over.

Q. You say you don't know that that affidavit charges you with having the drain ditch open during the month of March and April, and that you thereby diverted away from the river, something like 40 feet of water?

A. Well, that affidavit is a mistake, Mr. Treadwell. It is not true.

Q. That affidavit is a mistake?

A. It is not true.

Q. So you say what we are charging you with here is closing the drain ditch, do you?

A. One of the things.

Q. Now, Mr. Hanley, let us take up just a moment this matter of making objections to you. You know, do you not, Mr. Hanley, that after this decree was entered, we brought here what was known as a supplemental case in which we alleged that you continuously, in violation of that decree, allowed the head of the drain ditch to be opened, that you took the water out at high stages of the water when we needed it for irrigation; that you took it out at low stages of the water, when we needed it for stock; and you know that that case was tried, don't you? Don't you know that, Mr. Hanley?

A. Certainly.

Q. Didn't you testify in it?

A. Sure.

Q. And didn't it go through this court?

A. Yes, sir.

(Testimony of W . D. Hanley.)

Q. And didn't it go to the Circuit Court of Appeals?

A. Yes, sir.

Q. And hasn't it come back, and a new judgment entered again enjoining you from doing that?

A. Not from using the drain ditch for the purpose for which it was constructed.

Q. We will come to that. But you know we had objected to your use in the way you used that drain ditch, and the way you claimed you have a right to use it for years and years since this decree has been entered, and have had you in court all the time on it, do you not?

MR. WEBSTER: Wait a moment. Part of that is all right. But his assumption that Mr. Hanley objects to the way they have a right to use it.

MR. TREADWELL: I say we object to it.

MR. WEBSTER: That you object to our use.

MR. TREADWELL: The way he claimed to use it. You understand the question, do you not, Mr. Hanley?

A. Yes, I do.

Q. Will you answer it, whether you know we have objected or whether we haven't?

A. No, I don't know what you have objected to it, Mr. Treadwell. I sat beside of you and you won't tell me what you object to. The only thing I can get is what I am getting now. I don't know what you object to.

(Testimony of W . D. Hanley.)

Q. So you haven't yet got any idea that we object to your taking water through that drain ditch out of the river at a time when we need it for irrigation, and at a time we need it for watering stock? You don't know we make that objection?

A. Mr. Treadwell, I say to you now, and I say to you in open court,—I said to you when I was riding with you—I have cried it from the hilltops—that if there is anything to settle this detail of operating these little few acres that we are irrigating, all right. Now, the thing that is between us, it is fair to tell it to the court, I want to irrigate the balance of the country, I want to save that surplus water. I know you want it down there in that tule bed.

Q. Now, Mr. Hanley, you say that you took eleven people, I think, to look at your land in Section 27, in the neighborhood of the Orphan ditch. When did you do that?

A. How many?

Q. I thought you said eleven witnesses. I may have misunderstood you.

A. No, I didn't say that. I went down there the evening before I came here, with Mr. Pirie and Mr. Houser.

Q. What was the date, then?

A. That was Saturday afternoon.

Q. That would be Saturday, the 8th. Now, did you go there with people before that?

A. Yes, I went back there, I think Tuesday, Mr.

(Testimony of W. D. Hanley.)

Treadwell, after you and I were there, and the boards were out of the Orphan headgate.

Q. That would be Tuesday, May 4th, you mean?

A. The day after you and I were there that Sunday.

Q. I don't mean that. That was sometime before that?

A. Yes.

Q. I mean when you went back from here, did you go down there before you took the people down there on the 8th?

A. No, I hadn't been back down there again. I had been back down again after you and I were there.

Q. Yes, well, what is the date of that? That is the date I want to get.

A. That was Tuesday, I think, following the Sunday that you and I were there.

Q. Yes.

A. And the Orphan headgate was open then, and a couple of your men were there.

Q. I don't mean that. I was talking about the time after you left Portland the last time, and went back there, the 8th was the only time you went down there, do I understand, with people?

A. Yes.

Q. Now, you had 27 all flooded at that time, did you not?

A. Yes, sir.

Q. And that had been flooded by putting in the boards in the 21 dam, hadn't it?

(Testimony of W. D. Hanley.)

A. No, sir.

Q. It had not?

A. No, sir.

Q. The 21 dam had been in on the 4th, hadn't it?

A. Yes, sir.

Q. Have you seen the pictures here of the flooding of the whole of your land there by that dam?

A. By which dam?

Q. The 21 dam, after you put it in on the 4th?

A. No, I have not.

Q. Now, Mr. Hanley, don't you know that along, say, in the neighborhood of the 4th of May, your Section 27 before those boards in the dam were put in, had all been drained off? There was no water standing on it at all?

A. Why, it would have had water on, Mr. Treadwell, if I should have taken out, or rather taken out the manure dam, in the head of the 21 ditch.

Q. Very well; but as a matter of fact, it had been drained off, when Mr. Gilchrist and Mr. Newman were down there, around prior to the 4th of May; that is a fact, is it not?

A. It was dry.

Q. Yes, it was dry?

A. Yes.

Q. Then you went and put this water on there, and then took these men down there to look at it. Is that a fact?

A. At what date, Mr. Treadwell?

(Testimony of W. D. Hanley.)

Q. You took them down on the 8th, and you found it absolutely submerged with water, didn't you?

A. 21?

Q. Yes.

A. Yes, 21 was covered with water.

Q. And it had been all drained off?

MR. WEBSTER: 21?

Q. 27, I am talking about.

MR. WOOD: He has been talking about 21 all the time.

A. After the boards were put in the dam, in the 21 dam, we had taken all of the water out of the river, and turned it onto 21.

Q. That went on down to 27?

MR. WEBSTER: No.

MR. TREADWELL: Where else can it go? It can't go anywhere else, can it?

A. We were not intending to leave it on there any longer than to fill up the ground.

Q. To fill up the ground? And you found it filled up down there about how deep when you took your witnesses down there to look at it, to show them the conditions.

A. On 27?

Q. Yes.

A. It was filled up with the water that had run off 27, and the water that was backed up by the levee that had not got off or would not get off till it evaporated, and went off very slowly.

(Testimony of W. D. Hanley.)

Q. But it had once before that entirely drained off 27, hadn't it, into the Orphan ditch?

A. No, sir. No, it has not been drained off.

Q. Didn't you say awhile ago, that it had been drained off?

MR. WOOD: No, he didn't. He was talking about 21. You never said 27 once, and the record will show it.

COURT: How does the water get onto 27?

A. The water gets onto 27, principally from the overflow from the banks of the river.

COURT: How far above 21, or right at 27?

A. Right through 27.

Q. Just above the drain ditch?

A. It runs out all along the line of the bank, of the top of the bank all the way through 27, the water.

COURT: Now, that is the way the water gets onto 27 and not from the banks higher up above 27?

A. No, not this year.

Q. Now, Mr. Hanley, just what you are saying to the Judge, now, is that it has not overflowed the banks above there this year, but when you put in the 21 dam, and turn the water out from the 21 dam onto Section 21, that water goes down onto 27, does it not?

A. Probably a small part of it, Mr. Treadwell.

Q. It cannot get away in any way on that side of the river, after it goes onto 21 except by going down onto 27, does it?

A. Oh, yes, it goes down —

(Testimony of W. D. Hanley.)

COURT: Let me understand. When the 21 dam is closed, the water goes out on the east side.

MR. TREADWELL: On both sides.

COURT: Does it go out on this side?

A. Yes.

COURT: Very well. I didn't understand that. I notice the ditch, the Hanley ditch runs out on the east half.

MR. TREADWELL: Another one.

COURT: Oh, this is another one?

A. This is the real 21 ditch. They confuse the record by calling this the 21 ditch.

MR. WEBSTER: By this you mean the east?

A. The east ditch. That is known as the Hanley upper ditch. This is the 21 ditch.

COURT: Very well. I understand it now. I wondered how that water got in.

Q. Now, Mr. Hanley, with your dam at 21, you irrigate all that land in Section 21, between the ditch that you have just referred to to the court as the 21 ditch, and the river, do you not?

A. Why now, the big majority of that water, altogether the big majority of it, goes over 28, and down onto 33.

Q. Can't you answer that question, Mr. Hanley? It seems to be a simple question?

A. No, it doesn't.

Q. You don't irrigate that land at all then?

(Testimony of W. D. Hanley.)

A. Oh, yes.

Q. Don't you irrigate it by the water you turn out of the river by the 21 dam?

A. Partially so.

Q. And that water runs right down to Section 27, doesn't it?

A. A portion of it; a small portion.

Q. The water between that ditch and the river has all to run onto 27, hasn't it? Just look at the map and see if it could run anywhere else than onto 27?

A. Why, yes, onto 28.

Q. It would have to get over to the other side of the ditch to do that, wouldn't it?

COURT: He is talking about the water getting out on the east side of the ditch.

Q. Between the ditch and the river.

COURT: Answer that question. Here is the ditch running down here. He has reference to the water that gets out over the east side of that ditch.

A. This ditch is not very well kept up. If any water got out, on this side of the ditch, it would irrigate these little strips along here.

Q. How do you irrigate this land between the ditch and the river?

A. Out of this river.

Q. Out of the river?

A. Yes.

Q. And the 21 dam helps the water to go out of the river, doesn't it?

(Testimony of W. D. Hanley.)

A. The drain ditch regulates the river there.

Q. So the 21 dam is not used to put any water out of the river at all, I suppose, Mr. Hanley?

A. Not till after the 5th of May.

Q. Not till after the 5th of May?

A. Yes.

Q. Well, whenever it is used,—I don't care whether it is the 5th of May, or any other time—it is for the purpose of putting the water out of the banks, and out of the river, isn't it?

A. Yes.

Q. That is what it does, isn't it?

A. Yes.

Q. You say now, Mr. Hanley, that there were certain cuts along the river through your property, but that they were all in repair? What do you mean by them being all in repair?

A. That they were kept filled up—those breaks in the river.

Q. How did you keep those breaks filled up, Mr. Hanley?

A. Well, we have had a man working along the river this season to specially look after them.

Q. What is the method, I mean, by which you close those cuts?

A. Why, they have some of them, I see, apparently have been filled up with boards and manure put up against them.

Q. You have seen this picture here that has been,

(Testimony of W. D. Hanley.)

I think, referred to as Exhibit 15. Is that typical of the way those cuts are regulated?

A. Well, that is a very much exaggerated picture, Mr. Treadwell. There is only a little bit of water going around each edge of this, and it has went out here, and lays on the ground, and it is more an exaggerated picture I will say that if there was a personal examination there, the court would find that the water there is much higher in the river than it is outside. And these little places that is broke around is just places broke around. The river down there is a great muskrat country —

Q. What I am getting at, Mr. Hanley,—excuse me for stopping you; I want to draw your examination to a close,—I am just asking you if that is a fair representation of the general method by which those cuts are controlled on your property?

A. No, it is not. That is only an emergency method.

Q. You have a better method than that, I understand?

A. They have been filled with scrapers.

Q. Yes, I understand.

A. This is only an emergency in the wet time.

Q. How many of those are there on your property?

A. Well, I wouldn't say, Mr. Treadwell; only going back on my memory when I first came into the country, but I would say that probably there were as many as eight or nine on the east side of the river, and there was a very very large one at the place in the Nelson place, that was up in 22; in the original times, and on

(Testimony of W . D. Hanley.)

down, the big breaks were on the east side. The country leans east. The grade of the country is east. And there were probably half as many on the west side, or maybe as many, but they were smaller.

Q. Now, Mr. Hanley, you state that you take the water out at the drain ditch for the purpose of preventing it from overflowing your land in 35. Is that as I understand you?

A. Not from overflowing it, Mr. Treadwell, but to regulate it.

Q. Well, to regulate the amount of overflow.

A. The amount of water that the land can take care of.

Q. It would be a damage, then, I suppose, to you, to let it go down there? That is the reason you take it out at the drain ditch?

A. That country, including —

Q. Just try to answer the question, Mr. Hanley. I want to get along. Is it, or isn't it?

A. It is a damage.

Q. Still, if it goes on down and the company takes it out at the Orphan gate, then that is a damage to you, too? That is your idea?

A. It certainly is a damage to me.

Q. The right that you claim is to take the water away before it gets to your land, so it won't overflow it, or so as to regulate the overflow, and still, if you want it to go down there, to insist it shall go down there and overflow. That is your position, is it?

A. I said to you that day, Mr. Treadwell —

(Testimony of W. D. Hanley.)

Q. Never mind; is that your position, or isn't it?

COURT: Just state your position.

A. Yes.

Q. Isn't it a fact, Mr. Hanley, that when the Pacific Live Stock Company did improve the smaller part of the channel that is on their property, at the lower end of 34, you objected to them cleaning that channel, out, and said that by doing that, it prevented the water from overflowing your land?

A. Now, Mr. Treadwell —

Q. Well, did you so state?

A. Yes, I did.

Q. You so testify in the record?

A. Yes, sir, I did.

Q. Have you got that letter where I offered, on behalf of the Pacific Live Stock Company, to join with you in constructing that channel down between those two sections, and in which I also agreed that if that cost you any additional expense in getting your water onto Section 34, that we would share with you the expense of getting it there from the 21 ditch?

COURT: You mean 35?

MR. TREADWELL: 35, yes. I beg your Honor's pardon.

Q. You have that letter?

A. No, sir.

Q. Isn't it a fact that letter has remained unanswered for something like a year and a half or two years by you, Mr. Hanley?

(Testimony of W. D. Hanley.)

A. I don't think I ever had such a letter, Mr. Treadwell.

Q. Well, if you haven't, and Judge Webster has it, I would like to have it. I asked for it last night. I thought I sent it to you, and sent a copy to Judge Webster.

MR. WEBSTER: I haven't any recollection of such a letter, but I will look through my files. What time was it?

MR. TREADWELL: I think it was about a year and a half ago.

Q. Isn't it a fact, Mr. Hanley, that the Pacific Live Stock Company, through myself, has offered to join with you in constructing a river channel between Section 34 and Section 35?

A. Mr. Treadwell, you didn't do it the day we stood there, and I told you that that was the work that should be done.

Q. I am not going to get into any dispute with you, Mr. Hanley, as to our oral conversation, when I have got the matter in writing with you. Don't you know I have got the matter in writing to join with you in constructing that channel?

A. No, you never have, Mr. Treadwell.

MR. TREADWELL: I ask for the production of that letter.

MR. WOOD: Apparently no one ever got such a letter. Haven't you a copy?

MR. TREADWELL: Surely, I have a copy in

(Testimony of W . D. Hanley.)

San Francisco, but the communication is rather interrupted between those points.

MR. WOOD: Judge Webster says he doesn't recollect it. Mr. Hanley says he never heard of it.

A. If there is any misunderstanding about it, I will say now that I am willing to construct such a channel with perfect understanding of protecting my rights.

Q. Yes, I understand your rights, of course. You will state what you think they are, and if we don't agree with you, that ends the matter, doesn't it?

A. Oh, I don't know, Mr. Treadwell.

The following telegram was furnished later:

"San Francisco, Calif., May 12, 1915.

Mr. Edward F. Treadwell:

Care Clerk U. S. District Court, Portland, Ore.

Part letter October twenty sixth nineteen twelve to Webster as follows: 'We would therefore be willing to arrange that a ditch might be connected with the twenty one ditch, bringing water down to Section thirty four and as this would be made necessary by reason of the changed channel it would only be proper that we should stand half of the cost of this ditch, as well as the new channel. The water could readily be flumed over or siphoned under the drain ditch. If this arrangement meets with the approval of Mr. Hanley, the work could be done and the plans prepared by an engineer agreed upon, by the parties, or we could each appoint an engineer and have them work out the plans together.' Delger Trowbridge."

(Testimony of W. D. Hanley.)

Q. You testified about the water that you divert through the drain ditch, etc., going into Embree Slough. Have you got any dams in Embree Slough at the present time, Mr. Hanley, the various branches of it?

A. Are you referring to 23?

Q. 23?

A. Yes, Section 23.

Q. Well, my knowledge of the sections is not very clear.

COURT: Embree Slough is what takes up the water from the drain ditch, isn't it?

A. No, from both of the ditches—from the Hanley upper ditch and the drain ditch, too, both of them.

Q. Those are above the drain ditch, those dams that you have in Embree Slough, are they?

A. I have no dams in Embree Slough.

Q. At any place?

A. No, sir.

Q. Not in Section 23, or anywhere else?

A. There is a gate—there is a stop gate on 23, in the ditch right at this turn. This is not a correct map.

MR. WEBSTER: This has not got the extensions on there?

A. This is not a correct map.

MR. TREADWELL: I will withdraw that.

A. This ditch comes out around like this?

Q. Yes, that was not made at that time.

A. And this gate is somewhere at a point about here on 23, in the dug ditch.

(Testimony of W. D. Hanley.)

COURT: The northeast quarter of 23?

A. Yes.

MR. WEBSTER: This map does not show the ditches as they are now. That is an old map.

MR. WOOD: I would like to ask counsel and his client in the record here, whether he objects to Mr. Hanley filling the gaps in the river bank and keeping the bank in repair?

MR. TREADWELL: I object to him opening them.

MR. WOOD: That is not my question.

MR. TREADWELL: Of course we do not object to his closing those banks. We want them closed. That is what we are objecting to in this proceeding, that they were not closed, and they should have been.

MR. WOOD: Do you claim it is his duty to go and close them, if they are natural openings in the bank of the river?

MR. TREADWELL: I am not arguing this question now. My position will be very clear when we come to argue it.

REDIRECT EXAMINATION.

Q. I do not know how it is with others, Mr. Hanley, but I am a little confused myself about this drain ditch matter. Mr. Treadwell asked you whether you knew that the affidavit complained that in March and April you kept the drain ditch open, and diverted the

(Testimony of W. D. Hanley.)

water in March and April away from them, and then you said your understanding was that the complaint was that you kept the drain ditch closed. Have you got that information, that affidavit? My understanding is that that makes both of the points, what Mr. Treadwell said, and also what you said.

MR. TREADWELL: Well, if you can find it, you are a wonder.

Q. The first part of this information directly against you is that during the months of March and April it was unnecessary to drain water from the land of the defendant Hanley, but on the contrary, the same was the irrigation season, during which the defendant William Hanley was attempting to put water on his land for irrigation thereof, and notwithstanding the terms of the decree, for a long period in the months of March and April, had the head of the drain ditch open. Now, as to that, did you have the drain ditch open at any time in March and April, when it was not necessary for the drainage of your land, and the regulation of the river, to keep it from being overflowed?

A. I would testify by order that the drain ditch was closed, as early as it could be closed, so to be permitted by the ice and the winter conditions, that it was closed and that the gate was a new gate, reconstructed last year. And I went so far as to say "Don't depend on the boards. Go and haul some stack bottom, or something, and put in there." So that that ditch, that gate, is absolutely closed?

Q. Now, the complaint against you further is, as I

(Testimony of W. D. Hanley.)

understand by Mr. Treadwell, that you flooded your Section 27 by putting in the boards into 21 dam, and having flooded it, you then called witness' attention to the fact. I want to ask you whether or not 27 was flooded with water at any time prior to May 4th, when the boards of the 21 dam were in?

A. 27 has been over-flooded all spring, both by the amount of water that was going onto it, and the levee that is constructed on the north side of 34 by the company.

Q. Would it have been a relief against that flooding or over-flooding of 27, for you to have opened the drain ditch and relieved the river in that way?

A. Oh, it would have relieved it.

Q. So that is what you mean that they complained both ways?

A. Both ways.

Q. I don't know whether the Court clearly understands the office and purpose of this drain ditch.

COURT: Yes, I think I understand that. He has already defined it during his testimony. It is to regulate the flood waters, as I understand.

A. In the river.

COURT: Yes, in the river.

A. Yes.

MR. WEBSTER: Well, that is true, and yet it is not the whole truth. I didn't hear the evidence, and of course I am not in a position to say, but I would like to have this court get this regulation of this ditch, as to

(Testimony of W. D. Hanley.)

what its actual purpose is. Now, to say that it is for the purpose of lowering the water in the river is not to give the real purpose of this ditch. That water overflows Section 35 when the drain ditch is closed. That is the irrigation of Section 35, and it stands there until that section is irrigated. Now, by opening the drain ditch, it draws the water out of the river. The water from Section 35 flows out into the river and out from the drain ditch, and it takes the water off 35. That is the situation.

COURT: He has been over that feature. I don't think it is necessary to go over that again. I want to ask some questions about it myself before you get through.

MR. WOOD: Would your Honor just as lief ask it here? I want to get the subject together as much as possible.

COURT: I want to know, Mr. Hanley, was it intended that that drain ditch should be used for regulation of the waters of the river at any time prior to the 5th or 12th of May?

A. The drain ditch is to be operated any time that it is needed.

COURT: Is that the decree? Is that the purpose of the decree?

MR. WOOD: Yes, your Honor.

A. That is my understanding of the decree. It is operated any time that it is needed for draining purposes.

COURT: I got the impression that the Pacific Live Stock Company were to have the waters prior to

(Testimony of W. D. Hanley.)

May 5th, all that would come down to them, so that their lands should be watered; if the water was sufficient, the surface water, for surface irrigation. Now, then, if the drain ditch is used to conduct the water away from the natural course of the water otherwise, it would not go down onto their lands, and I want to get at the real purpose of the decree as to when that drain ditch should be used.

MR. WOOD: I think, your Honor, it could be stated by agreement of counsel. It is substantially this: They are to have all the water prior to these dates, except that Hanley is to have the privilege to protect himself against overflowing—over watering. Is that your understanding?

MR. TREADWELL: Not at all, your Honor. I would say I think it is perfectly proper for you to get Mr. Hanley's idea, if that is what your Honor wants.

COURT: That is what I want.

MR. TREADWELL: Whether that is our idea, or not, of course would be an entirely different proposition. We contend that this matter is fully covered by the adjudication of this court, and what Mr. Hanley says is the purpose, of course, is not binding upon us. We are perfectly willing he should give it to help the court.

COURT: I understand your idea of the matter is that you can use that drain ditch at any time you desire, notwithstanding the conditions down below, for the protection of yourself by overflowing on Section 35.

A. And 27.

(Testimony of W. D. Hanley.)

Q. And 27.

A. Yes, any time.

COURT: I think that is clear.

MR. WOOD: Here is their information: "That in and by the terms of the said decree, the said defendant Wililam Hanley was enjoined and restrained from using a certain ditch, except for the purpose of draining water from the surface of his land; that during the months of March and April, 1915, it was unnecessary to drain water from the said land of the defendant." There is no limitation of time—whenever it is necessary to do it. However, as you say, everybody agrees that the decree speaks for itself.

A. This ditch was dug in 1893, and this gate was put into it and it was operated up till the time that this controversy started without any questions being raised about it.

COURT: You have reference to the drain ditch?

A. The drain ditch. The water that goes out from the drain ditch goes into the Embree Slough, and down onto the company's land.

COURT: You say that goes onto the company's land. It has got to go back into the stream again, and then re-directed from that.

A. Yes, back in the re-formed channel.

COURT: I understand that the banks are higher than the surrounding territory.

A. It goes into Embree Slough.

(Testimony of W. D. Hanley.)

COURT: Does Embree Slough run into the channel of the stream?

A. Yes, sir. Yes, below.

COURT: There is an opening for that to flow into?

A. Yes, and the slough banks is lower—it catches the water that gets away from the channel.

COURT: Do you say then that all of the water that you divert up there, finds its way down onto this land below?

A. Yes, sir.

MR. WEBSTER: Through 27, does your Honor mean?

COURT: Diverted by the drain ditch.

MR. WEBSTER: Yes, it all goes back onto the company's land.

COURT: Isn't there any waste through there by absorption, etc., and by evaporation?

A. They use it for an irrigation on their Section 36, and the southwest quarter of 26.

COURT: That is a very small tract of land, as compared with what they have below.

A. Then it goes right on into the Embree Slough.

RECROSS EXAMINATION.

Q. Now, Mr. Hanley, the first dam that the company has where it can take the water out of the channel of the river itself is known as the Mace dam, is it not?

(Testimony of W. D. Hanley.)

A. Well, that is on the re-forming of the slough, out of 34.

Q. Yes. What we are talking about is the river channel after it leaves 34.

A. Well, that is the re-forming of that slough there, which is at the Mace land.

Q. You are beginning to call the river channel a slough, are you?

A. It is a slough.

COURT: That Mace dam is in Section 2?

A. Yes.

Q. This water you take out through the drain ditch goes miles below that before it comes back into the river, doesn't it?

A. No, it does not go miles, Mr. Treadwell.

Q. How far below that point does the Embree Slough come back to the river?

A. About three miles.

Q. Three miles, yes.

COURT: Below the Mace dam?

A. Yes. I would not say three miles below Mace's dam. What I had more reference to is three miles from where it started, through there.

COURT: I think you have gone far enough with that. What do you want to ask?

REDIRECT EXAMINATION.

Q. I have always felt that "drain ditch" is a misnomer. I want to bring that point out. Now, Mr.

(Testimony of W. D. Hanley.)

Hanley, is there any obligation on your part to keep this ditch open and drain it, or is it for your benefit and privilege?

A. Why, so far as this drain ditch is concerned, it is clearly out of repair. It doesn't take but little water. The company has refused by neglect to keep it open throughout the—

COURT: Upon whom is it *incumbernt* to keep that head of that drain ditch regulated?

A. It doesn't seem to—myself to operate it—to operate it at the head.

COURT: Well, that answers the question.

MR. WOOD: Well, not quite.

Q. My point is this: Is that drain ditch intended to absolutely drain the land dry, or is it intended to regulate the amount of water that you let go on?

A. To regulate the amount of water that goes onto it.

Q. Well, then, if you let a certain amount of water go onto 35, we will say, before you drain it off, it forms a part of the irrigation system.

A. It does, yes, the distributing system, a very important part of it.

Q. And you have the right to let as much water stay on, or take as much water off as you see fit.

MR. TREADWELL: Of course this is all understood, that we are not bound by his conclusions.

COURT: Oh, of course, I understand that. We are trying to get at the situation, is all.

(Testimony of W. D. Hanley.)

Q. You have the right to let as much stay on, or take as much water off, as you see fit?

A. That is my understanding.

Q. In other words, the country when you went down there, down to 35, was swamp, and to reclaim it, you built this drain ditch, but you don't want to take all the water off, but you want enough to make hay?

A. Yes. We have changed the lands in the vicinity of its operation from tules and flags, to actual hay land, and very good quality.

Q. Now, suppose the company came forward and said: "Mr. Hanley, we relieve you of all obligation about this drain ditch, and we will put in such a gate at the Orphan Headgate, as will take out all of the water, and you will not be bothered with any flooding," would that satisfy you, or do you want some of the water on 35?

A. I want the use of the water on 35.

COURT: Do you remember when the Orphan's Headgate was built, when that ditch was built?

A. In 1893.

COURT: About the same time the other was built then, about the same time the drain ditch was built?

A. Oh, the Orphan Headgate?

COURT: Yes.

A. Oh, the Orphan Headgate was only put in at the time of the contempt proceedings before Judge Bellinger. It was a controversy then with the settlers that owned the land west of us.

(Testimony of W. D. Hanley.)

COURT: Well, I think that was testified to. I didn't know but what you would recall it.

A. The Orphan Headgate has only been in, I would say, the last three years, or four years, as it is now operated—as it is now—only since the company owned the land.

Q. Mr. Hanley, do you know how long the boards were in the 21 dam on the 4th of May?

A. No, I am not prepared to testify on that. The only knowledge I had of it was when I came from my house across facing 21, and seen the gulls on 21.

Q. If you don't know, never mind. I think, though, there is some testimony here on the part of the other side. I think maybe by Mr. Gilchrist,—no, I am mistaken about that; he said he saw them in the afternoon. Well, then, assuming that the boards were in from nine o'clock to two, or something like that, would the effect of those boards being in the 21 dam flood Section 27, down above their 34?

A. No, the water would go on to 21, and across into 28, with the exception of a small per cent of it going in on 27.

Q. And that would be true, no matter how long the boards were in?

A. Yes, that would be true.

Q. Would it, in your opinion, from your knowledge of the country there, be possible to get the water on 27 that was on it, by putting the boards in this dam for one day?

A. There was no water got to 27 on that day.

(Testimony of W. D. Hanley.)

Q. No, but I say, would it be possible, by closing the 21 dam for one day, would it be possible to flood 27, the way it was?

A. No, sir. 27 was flooded from the river. 27 cannot be very practically irrigated without reconstruction of levees, etc., without using the river channel, as it is higher than the balance of the section. It is just natural irrigation.

Q. You said, in answer to the question of Mr. Treadwell, something like this: He said, "Well, now, when you put the boards in 21 dam, and close the 21 dam, that turns the water out of the river," or something to that effect. I don't know whether it is true, or not, that it turns it out just through the 21 ditch, and the Hanley ditch, or whether it is putting the boards in the 21 dam causes the river to slop over its banks. Now, which is it?

A. We have used the water in a rotating way, so that the order was given on the 5th of May to put the boards in the Hanley upper ditch, and put all of the water out on 21, first thing after they started to use the water.

Q. Still, I didn't make myself clear, or you don't answer my question. Does the 21 dam being closed cause the river to slop over its banks, and aid in irrigation, or does it turn the river out through the ditches only?

A. Why, the water goes out mostly, probably through the depressions, but goes out generally all over the banks.

(Testimony of W. D. Hanley.)

Q. So it goes out, not only through the 21 ditch, and the Hanley upper ditch, but out over the banks as well?

A. Not the Hanley upper ditch. The Hanley upper ditch when the boards were put in the 21 dam, was closed, and all the water that was coming down, went onto 21.

Q. Went out on the 21 ditch?

A. Yes, on the Section 21, on the west side of the river.

Q. What side of the river?

A. West side.

Q. So that there was nothing open on the east side of the river?

A. No, sir.

Q. Well, now, in addition to its going out on the 21 ditch, I understand it put it over the banks of the river as well?

A. Yes, sir.

Q. And that would be on both sides of the river?

A. No, it would only be on the south side. There probably was some went out and ran around, but that would be a small matter.

Q. It would not put anything out below the dam, would it?

A. No, nothing out below the dam.

Q. It would relieve the river below that?

A. No, sir.

Q. You mean the dam would relieve the river below it?

(Testimony of W. D. Hanley.)

A. Yes, sir.

Q. When was this 21 ditch opened this season?

A. Mr. McLaren opened it after I had went up there and looked at the dam in April.

COURT: You say that was opened in April—the 21 ditch?

A. The ditch on 21 that is on the west side of the river. This ditch.

COURT: Well, was the water put into that ditch in April?

A. The water runs into it.

MR. WOOD: That is the point I was just going to bring out. Water runs in there when the dam is all open.

A. It runs out. This land would all have overflowed this spring, if this little manure dam in the head of 21 ditch had been out of it. The banks of the river, 21 is the first place that the river commences to flood on the east fork—natural flood.

MR. WEBSTER: When the dam is open, you mean?

A. When the dam is open.

MR. WOOD: You mean the 21 dam?

A. Yes, the channel flows the water out. It has always been a hay section. I cut hay there in 1882.

Questions by Mr. Webster.

That drain ditch was built by you, and the company, under an agreement to build it, wasn't it?

(Testimony of W. D. Hanley.)

A. Yes, sir.

Q. That was in 1893?

A. In 1893.

Q. And it runs from your land onto theirs, doesn't it?

A. Yes.

Q. And there, you are not under any obligation and never have been, to keep up the end of the drain ditch that is on their land?

A. No, sir.

Q. But only on your own?

A. Yes.

Examination Continued by Mr. Wood.

Q. I want to ask another question to clear this. This water that Mr. Treadwell testified to when he was a witness, which he described as a sea of water over your land, what land was that on?

A. That was on the south end of 27.

Q. And where was it from?

A. From the Orphan Headgate, and the overflow of the river.

Q. It was not your doing at all?

A. No, sir.

Q. Now, have you ever at any time, cut into the banks of the river, to use them as part of your irrigation system, or given any such orders?

COURT: I think he has been over that too.

A. They are natural washes, originally.

(Testimony of George McLaren.)

GEORGE McLAREN

A witness called on behalf of the defendant, William Hanley, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Wood.

Q. Where do you live, Mr. McLaren?

A. Near Burns.

Q. How long have you been out there?

A. 20 years.

Q. Just speak out loud?

A. 20 years.

Q. You have some property of your own—land out there?

A. I have.

Q. How long have you been working for Mr. Hanley?

A. Oh, I have worked for him different times for 25 years—such a matter. I had worked for him before I came there.

Q. You are not one of the regular employes of the ranch, but you work at odd times?

A. No, not at present; not of late years.

Q. Have you had anything to do with the handling of the water on the ranch?

A. Yes, sir.

Q. Regulating the dams?

A. Yes, sir.

(Testimony of George McLaren.)

Q. Has that been somewhat of a speciality of yours?

A. Yes, sir.

Q. Did you ever have charge of, and handle and operate what is known as the 31 dam, called in this proceeding the Luig dam?

A. Yes, sir.

Q. When was that?

A. Why, along about 1901 or 1902.

Q. For how many years?

A. Three or four years. I don't remember which.

Q. Do you know whether you ever paid any particular attention as to any date of the month, when you put the boards in that dam?

A. I did not.

Q. When did you put the boards in from year to year?

A. When I thought it was ready, when we needed the water.

Q. Do you think you ever put them in before the 12th of May or the 5th of May?

A. Some years I think I did.

Q. What is your reason for thinking so?

A. Well the 21 dam could not be put in till the 5th of May, and I would attend to those outside fields first, if they needed water.

Q. Do you mean by that you would put in the 31 dam first?

A. Generally, yes, sir.

Q. How much prior to the 21 dam?

(Testimony of George McLaren.)

A. Oh, it would be about the same time, a few days.

Q. Have you any other means of determining that you would put in the boards in the 31 dam, in the month of April?

MR. TREADWELL: Objected to as leading and suggestive.

COURT: I will overrule the objection. Answer the question.

A. State it again, please.

Q. I say, other than the date of the 21 dam, have you any other means of determining that you put the boards in the 31 dam some times in the month of April?

A. Well, they generally went away about the beef at that time, and I would be alone at the ranch generally; about the 10th or 15th of April they would be gone, and I would commence working with the water then.

Q. Has that 31 dam been used every year in this way, as far as you are concerned, without regard to any particular day of the month?

A. Yes, sir.

Q. Now, you are familiar with the Hanley drain ditch, as it is called—know what it is?

A. Yes, sir.

Q. Did you have anything to do in recent years with repairing the headgate of that ditch?

A. I did.

Q. State when it was.

(Testimony of George McLaren.)

A. Last fall, about October, I rebuilt it, the headgate.

Q. Entirely rebuilt it?

A. Entirely rebuilt it, with the exception of the floor. I left the floor the way it was.

Q. What lumber did you use?

A. New lumber.

Q. From the mill?

A. Yes, sir.

Q. Was there any rock in it?

A. No, sir.

Q. How did you set this into the banks? How were the wings?

A. The wings ran into the bank, extended into the bank about eight feet.

Q. Were the wings water tight—any water go around them?

A. No, sir.

Q. I think you are the one that closed the head of the drain ditch first, didn't you?

A. Yes, I left three boards, put three boards in it, when I finished the headgate last fall.

Q. Well, that was last year?

A. Yes, sir.

Q. Did they remain in till this spring?

A. As far as I know. I was not down there in the winter myself.

Q. Did you state what month you rebuilt it?

A. October.

Q. October of last year?

(Testimony of George McLaren.)

A. Yes.

Q. You left three boards in there, but you don't remember—but you were not back there?

A. No, I was not back there in the winter.

Q. When were you back there?

A. Sometime about the middle of March.

Q. How was it then?

A. Why, I put more boards in it to raise the water up.

Q. What was the purpose in leaving these boards in, and of adding more boards to it? What do you mean, in other words, by raising the water up?

A. I put the boards in to keep the water in the river.

Q. A young gentleman here has testified — Mr. Griffing—that he met you on the Hanley place and had some talk with you about irrigation, or the plan or system of irrigation. Do you remember meeting this young surveyor or engineer?

A. Yes, sir.

Q. About when was it?

A. Why, it must have been some time in March.

Q. Did you meet him more than once?

A. I did meet him once or twice, I think.

Q. On the property?

A. Yes, sir.

Q. Where were those places of meeting?

A. The first time I met him out in 23, at the gate out there, the water gate.

Q. How far from the river?

(Testimony of George McLaren.)

A. Why very near two miles.

Q. Where was the other place?

A. On the bridge across the Hanley upper ditch, near the 21 dam.

Q. How far is that from the river?

A. Oh, 100 yards, maybe, or 100 feet.

Q. Any body present beside you two?

A. Yes, sir.

Q. What was your conversation the first time of meeting?

A. He introduced himself and told me that Mr. Hanley said for me to give him any information I could about the water, where it was going to, and all the outlets, so that he could make measurements on it. As near as I recollect, that was about what we talked about.

COURT: Was that when you were out in Section 23 there?

A. When we was out in Section 23.

Q. Is that about all that you recollect?

A. Why, he asked me where he should go to find the places and where the water went to, and I told him as near as I could.

Q. Well, what was the conversation at the other meeting?

A. I don't recollect we had any very much conversation. He was taking up his water gauges there, and I just asked him about how much water was flowing.

Q. No special conversation.

A. No.

(Testimony of George McLaren.)

Q. Well, now, to refresh your memory—and if I don't state it correctly, I hope counsel will interrupt and correct me—I understood Mr. Griffing to say that in a conversation with you you said to him that you had charge of the irrigating or something to that effect, and that these cuts were made in the bank, and were a part of Hanley's system of irrigation, cutting the banks of the river. Was there any such conversation?

A. Well, I had reference to the ditch that we were standing on—the Hanley upper ditch.

Q. In all the time you have been on the Hanley property, do you know of any occasion where he has cut gaps in the banks of the river, to let the river out, and use it as part of his irrigation?

A. No, sir.

Q. What has been your work and business when you were at work on the ranch, in regard to these banks? What has been your duty?

A. To always keep them in repair.

Q. What has been the method of keeping them in repair?

A. Well, generally every fall we went around with scrapers and fixed any places that were wearing out, or any breaks that come in in the freshets, that were fixed temporarily; we would make them permanent as we could—rebuild levees.

Q. Did you have your attention called to a board in the 21 dam, and some willows lodged in the dam this year?

A. Yes, sir.

(Testimony of George McLaren.)

Q. About when was that?

A. Why, it was some time about the last of March, or last of April.

Q. Who called your attention to it?

A. Mr. Hanley.

Q. Do you remember whether it was at the time that Judge Webster was out there on the water cases?

A. I think Judge Webster went home.

Q. You think he had gone home. The reason I am asking you, I am under the impression that it was earlier than the last of April; but as you cannot fix it, we will let it go at that. Now, state what you found when you went to the dam?

A. I found two or three willows, and some small twigs in there, little small stuff that had lodged in the high water.

Q. Was it obstructing the flow of the river, and raising the level of the river above the dam?

A. Not at all. They were out of the water when I went there.

Q. How many willows were there?

A. Oh, there were two or three willows that was six or seven feet long.

Q. State what labor you did to relieve the situation?

A. Well, I got hold of one, the longest one that was furthest up, and pulled it loose, and they all went away, floated down the river.

Q. Did you see a board there?

A. I did.

(Testimony of George McLaren.)

Q. Where was the board—on what side of the dam?

A. It was on the south side, in the slack water.

Q. In slack water. Where was the current of the river going out?

A. The current all hits the north side of the dam.

Q. And did you take this board out?

A. Why, I pulled it up above the water. It was loose. I pulled it up when I pulled the willow out.

Q. Was it one of the regular boards of the dam, or was it a board that had lodged there?

A. I could not tell.

Q. I believe its dimensions are already in. Now, as to the construction of this dam, is there any permanent board nailed across which is higher than the floor of the dam?

A. On 21?

Q. Yes.

A. No, sir. Do you mean right where the boards are put in?

Q. No, I mean anywhere.

A. I believe there is a two inch plank in front.

COURT: Is that above the floor of the dam?

A. Just nailed onto the floor, to nail the pilings to, that are driven down in the ground.

COURT: Does that impede the water coming through the dam?

A. I don't think it does.

COURT: What is that?

A. No, sir, I don't think it does. I don't see why it should.

(Testimony of George McLaren.)

COURT: There is some evidence that there was a board in there about six inches high, and that that extended above the floor of the dam.

MR. WOOD: That is the board I was asking about, which he took out. I am now talking about a permanent structure of the dam.

COURT: Oh, yes.

Q. When was the last time that you closed the head of the drain ditch?

A. Along about the middle of March, or between the middle and the 20th, I couldn't say for a day. I went down and put the boards in when the ice had gone out of the river, so the boards would stay in, and raised it up as high as I thought was necessary, so as to run out on the banks on both sides.

COURT: That was about the middle of March?

A. Between the middle and the 20th. I put them in and raised it up, and made it overflow on both sides at that time.

Q. How was the ice in the river this season, compared with other seasons?

A. Well, it was a good deal thicker.

CROSS EXAMINATION.

Questions by Mr. Treadwell.

Mr. McLaren, could you state any particular years that you had the actual charge of the Luig dam?

A. I couldn't say right exactly. It was somewhere about 1891, along there.

(Testimony of George McLaren.)

Q. 1901, you mean, don't you?

A. Yes, sir.

Q. Do you know how many years you actually did anything toward putting the boards in the dam?

A. I put them in for three or four years there.

Q. Three or four years. Did you work with Mr. Luig in putting them in?

A. No, sir, I was always alone.

Q. You were always alone?

A. Yes.

Q. You never worked with Mr. Luig at all?

A. No, sir.

Q. How many boards does the drain ditch have altogether when you put all the boards in so as to shut it up?

A. Why, it is about five feet deep; the box is, I believe.

Q. Well, about how many boards did you put in altogether, to shut it up as tight as you can?

A. Oh, it is owing to the size of the boards. It takes about enough to raise it up five feet, it is just owing to the material we have. A 12-inch board would raise it ten inches, if they are on the slant.

Q. What would be your estimate as to the number of boards you have altogether when you have left them all in?

A. Seven or eight.

Q. Seven or eight boards? So you left three boards in in the fall, and when did you put the next boards in, and how many?

(Testimony of George McLaren.)

A. I put them in in March.

Q. How many did you put in the first time?

A. I put in four or five boards. I am not sure which. I put in enough to raise it up to the top of the bank.

Q. Did you put them all in at that time?

A. They were all out at that time when I went to put them in. They raised up and floated away when they floated up.

Q. When you went there, the three that you had had in were not in?

A. No, sir.

Q. So you put those back? Did you put all the rest of them back, or not?

A. I put in enough to raise the water so it would overflow the river on each side.

Q. Well, did you put in all the boards in the head of the drain ditch that you ever put in, or that were necessary to complete the structure?

A. I put in four or five boards.

Q. You put in four or five boards then?

A. Yes.

Q. Did you put any more boards in afterwards?

A. No, sir.

MR. WOOD: I think I misled you. As I understand it, he was only there when he rebuilt it, put in three boards, then he went out in March—they were out—put in four or five more. I don't think he was back. That is my present understanding of it.

A. No, sir, I was not back."

(Testimony of John Ryan.)

JOHN RYAN

A witness for the defendant William Hanley, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Wood:

“Mr. Ryan, where do you live?

A. I live in Harney Valley.

Q. How long have you been there?

A. Three years.

Q. What are you doing out there?

A. At the present time I am working for Mr. Hanley.

Q. Have you got any interests of your own out there?

A. Nothing whatever. I have a homestead out there.

Q. You don't count that for anything?

A. No, not there.

Q. Yet awhile. Well, what are you doing for Hanley?

A. I have been working on the river this year, this spring.

Q. How long have you been working for him?

A. Well, I have worked for Mr. Hanley off and on for the last two years.

Q. What have been your special duties this year?

A. This year—you mean this spring? Or the first of the year?

(Testimony of John Ryan.)

Q. Well, the first of the year.

A. I fed cattle part of the time, and when they turned the cattle to the hills, I have been working on the river.

Q. What have you been doing on the river — what part of the river?

A. Looking after the water, and I have worked on the river from north of 27 down to the Fennimore place.

Q. Well, now, what particularly have you been doing? What acts?

A. Looking after the irrigation.

Q. Yes, but doing what?

A. Oh, looking after the dams, and closing the breaks in the river.

Q. Where have you been closing breaks in the river?

A. On 27 on the east side.

Q. Do you mean by breaks in the river, in the river bank?

A. Yes.

Q. Here is a photograph "Break in the river bank, East Fork of Silvies River, about one quarter mile above the Hanley drain ditch."

A. Above the Hanley Drain ditch?

Q. Yes. "Part of the Hanley Irrigation System," —Plaintiff's Exhibit 15. Do you recognize that?

A. Yes, sir.

Q. Whose work is it?

A. It is not mine. That is on the west side of the river.

(Testimony of John Ryan.)

Q. Do you know who constructed it?

A. I do not.

Q. Have you been there at this place?

A. Yes, sir.

Q. I will ask you whether that is a permanent irrigation structure or a temporary structure, to stop the river going out?

A. Well, that would be a temporary structure.

Q. The river is on the side towards you, toward the looker?

A. Yes, sir. But that is on the west side of the river.

Q. Yes, that is what it says.

COURT: You say that is a temporary structure?

A. That would be a temporary structure.

COURT: I understand then, from you, that the water goes out that gap, and that that is put in there to keep the water in the channel temporarily?

A. While the water is high at all, it cannot be fixed permanently. You understand when the water is running out you cannot put dirt or anything in there. You cannot make it stay.

COURT: Oh, I understand.

Q. Did you repair any breaks in the bank, any gaps in the bank of the river yourself?

A. Yes, sir.

Q. Where? What part of the river?

A. On the east side, repaired two on the east side, and I did fix that one temporarily later on.

(Testimony of John Ryan.)

Q. There is a statement here that there is a very wide cut made in the bank of the river, in order to let it out in the left bank of the river—that would be the east bank of the river—about 900 feet below the Hanley drain ditch, a cut in the bank about 12 feet wide, and three feet deep. Was there any such cut made?

A. There was a break there. That is correct as to the size.

Q. And location?

A. And location, yes, sir.

Q. You mean a natural break in the river?

A. That is what it would look like to me. It was washed out. I fixed it.

Q. You didn't make any cut there?

A. I did not.

Q. Did you do anything toward it at all?

A. I did. I fixed it up. My instructions were to fix all of them.

Q. How did you fix it? What did you do?

A. I put poles across where the water was high, put poles similar to that one in the photograph across this break. I run those boards down in there, the first day I went up on horseback, I carried a shovel and a saw. The ground was so soft it was pretty near impossible to get a team in—it was impossible to get a wagon over it. I put that structure in like that, and with my shovel tried to put some dirt in it to stop it, you see, but I could not make it stick. So I hung up my shovel and went back home, and the next morning brought the team and a sled which I could haul over the ground, and

(Testimony of John Ryan.)

fixed it with the stack bottom. That is all you can make stay when the water is running over the banks of the river on both sides.

COURT: What kind of a bottom?

A. Bottom of the old stack, where the cattle come in and tramped it, make it wet and solid, it will sink in the water, going against those boards, and will not wash. I fixed it with that until it was perfectly tight, and until the river goes down, and can be fixed permanently.

Q. Instead of opening the river, then, you closed it?

A. Yes, sir.

Q. Here is a place about 1,000 feet above the south line of Section 27 on the left bank of the river, the east bank—a cut—it doesn't give the dimensions. It doesn't give the dimensions, but there is a location about 1,000 feet above, or north of the south line of Section 27 on the east bank of the river. Do you remember any such cut?

A. There was no cut that there was any water going out of on that side. There had been a cut—there was a cut there that had been fixed, and there was a few muskrat holes where the water was coming through, probably in streams like your arm, which I closed. That is all the break there was in that location.

Q. Who gave you your orders to keep the river banks tight?

A. Mr. Hanley.

Q. In the whole length of the river, there in Section 27, or as far as you have any charge of it, are there any

(Testimony of John Ryan.)

cuts made artificially for the purpose of letting the river out, or are they all natural cuts?

A. I have never seen any that was made artificially. They all seem to be natural, and have been closed up; wherever it showed there has been a cut, they have all been closed some way or other.

Q. Did you have anything to do with closing the drain ditch?

A. That is the one that goes east from the river?

Q. Yes.

A. Yes, sir.

Q. What time was that?

A. I put the boards in on the 5th of April.

Q. State how you closed it?

A. I put the boards in on the 5th of April, that is full, clear up—I don't remember how many—all I could get in. Then next day I fixed this break that we have been speaking about, that went east. I think I was a day or two days on that. I know one, and I think two days, and at the same time I went up to see how this was working, because my instructions were to close it tight.

Q. Who gave you the instructions?

A. Mr. Hanley; and I found that where the boards apparently were not down to the flow, that there was an underdraft of water going out, so I gets another plank and tries to pound them down, and found too much pressure on them, so I hauled this stack bottom, manure, and chinked them in there, till I did stop the flow of water.

(Testimony of John Ryan.)

Q. Well, were there any leaks around it, in through the wings?

A. No, it was a new structure.

Q. Any rot in the structure?

A. Rot?

Q. Yes, rot in the boards?

A. It was new lumber, what I could see of it, apparently. There was no rot, no.

Q. Do you know the gate and ditch known as the Orphan headgate?

A. Why, yes.

Q. Now, it has been left a little bit in dispute here, where the water goes from that ditch. Have you ever seen it running off?

A. Why it goes west from the river.

Q. I know, but after they get through with it, in using it for irrigation, where does it finally end up?

A. Why, in what is known as Chapman Slough.

Q. Have you seen it going down there?

A. I have.

Q. This year?

A. This year.

Q. Do you know a dam called the Fennimore dam?

A. Yes, sir.

Q. Where is that located?

A. It is in the northeast corner of Section 3.

Q. Was it part of your duty to look after that?

A. It was.

Q. Did you put in the boards?

A. I did.

(Testimony of John Ryan.)

Q. This year?

A. Yes, sir.

Q. When?

A. Along about the middle of April, I think, or middle of March.

Q. How many times did you have to put them in?

A. Oh, seven or eight times.

Q. Who took them out?

A. Well, I never caught anybody taking them out but once. I don't know the man's name, but he said he was working for the P. L. S. Company, and was taking them out under Mr. Newman's instructions.

MR. TREADWELL: We are perfectly willing to admit that.

COURT: You say it was in April that you were putting those in?

A. April, yes.

MR. TREADWELL: You said March.

A. Yes, I said March, but it was in April. It was about the middle of April. I was thinking this was April, but it is May. There was ice in in March—it didn't need any boards.

Q. You located this Fennimore dam, didn't you, in your testimony. Where is it?

A. It is in the northeast corner of three.

Q. That is below the Orphan headgate?

A. Below the Orphan headgate, yes.

(Testimony of John Ryan.)

CROSS EXAMINATION.

Questions by Mr. Treadwell.

Mr. Ryan, you stated that you put the boards in the drain ditch, I think, about April 5th. How many boards did you put in at that time?

A. I don't know. I saw some narrow boards—there wasn't boards enough there to fill it, and I think I put in one or two new ones, and I took some of—there was a pile of lumber that had been taken out of the old headgate—and I picked out the solid lumber and sawed some, and put them in, some six, some four, some ten inches, till I filled it full. I don't know how many there were.

Q. Did you put in any more after that?

A. I did not.

Q. How did you fix the date of that?

A. I make a note of my work.

Q. Did you make a note of that work?

A. I did, sir.

Q. Have you got it here?

A. No, sir. I made a mental note with my wife.

Q. Were all the boards in the dam when that picture was taken?

A. That don't show any water going over the top to speak of.

Q. It don't?

A. A little bit right here, and a little there. That is water is coming under.

Q. All coming under, is it?

(Testimony of John Ryan.)

A. You see just a little stream of water there and there, in three different places going over.

Q. This is where the water was stopped? The dark place is where the upright is. There is no water. All this other is water.

A. This board above this dark line here, that is a board up that way, above this dark line. This water is coming under.

Q. There isn't any water pouring over the dam there at all. (Referring to Exhibit 8.)

A. It don't look like that to me. It looks like three little streams of water, and this boiling here up from in under.

Q. The dam was not very tight then, Mr. Ryan?

A. No, I testified that it was not tight underneath, when I first put it in, before I put this manure in, in the next day or two.

Q. When did you put the manure in?

A. Not later than two days after I put the boards in.

Q. About these cuts in the bank. Besides these cuts where there is stuff stuck in like the ones we show in this picture here to regulate the water, you say there is quite a number of —

MR. WOOD: May it please the Court, counsel I presume knows that he cannot put a question which will, as answered, mislead the witness. Now, there is not one particle of testimony here that these temporary repairs are to regulate the water.

(Testimony of John Ryan.)

MR. TREADWELL: I object to the witness being told counsel's theory of this matter when I am cross examining the witness.

MR. WOOD: It is an unfair question, therefore, when he says to the witness "Now, when these boards that are put in to regulate the water"—the witness' mind would not perhaps grasp that, and I object to the inference that they are put there to regulate the water, until there is some testimony here that they are put there to regulate the water.

COURT: I am keeping that in mind. I think I will not be misled by it. Go ahead with your question.

MR. WOOD: Of course, your Honor, we have to make this record for any possible future use.

COURT: Yes, I understand.

Mr. Ryan, if these boards are not put in these cuts for the purpose of regulating the water, will you please tell me what they are there for.

A. What boards are you talking about?

Q. Why, the boards in any cut along the river bank?

A. What are they put there for?

Q. Yes.

A. My experience in putting them there has been when I want to fix a break, to put them in there to kind of check the current so that you could make other stuff stay until you could stop it.

Q. So they are put there to stop the water when

(Testimony of John Ryan.)

you want it, and when you want to close the water out, you stop them up—is that correct?

A. When I am closing a break, I put that in; that is, I cannot fix it —

COURT: I understand this witness has already testified those boards were put in there to stop a break, and not for regulation?

A. I cannot fix it otherwise.

Q. I mean they are put in there to keep the water out when they are put in there, are they not?

A. To keep it in the river.

Q. To keep it in the river when those are out. If they were not out, the water would come out of the river there, though?

A. Of course if there is nothing in there, it would run out of the break.

REDIRECT EXAMINATION.

Q. Are they any part of an irrigation system to be taken out and put in as part of an irrigation system?

A. How is that?

Q. Are they any part of an irrigation system to be taken in and out, to let the river run out as a part of an irrigation system?

A. Where?

Q. These boards that we are talking about. Do they form any part of any irrigation system?

A. Not those that we put in to stop a break in the river bank don't.

(Testimony of John Ryan.)

RECROSS EXAMINATION.

Q. You do have them out—when they are not there the water is running out onto land?

A. I haven't had any of them out.

Q. You haven't had any of them out this summer?

A. No, sir, I have been putting them in and putting stuff in to stop them.

Q. When was it Mr. Hanley told you to close those up this year?

A. This year?

Q. Yes.

A. It was along the 3d or 4th of April.

REDIRECT EXAMINATION.

Q. There wasn't any exception made. You were to close them all?

A. Close them immediately. I had other work in 5 I was doing, and I was to stop that and close these immediately.

Q. What condition have you found the Orphan headgate in when you went by?

A. I have always found it open. That is, water running out.

During the course of the argument the witness John Ryan was recalled and testified as follows:

EXAMINATION BY THE COURT.

Q. Do you know what time the ice went out of the streams there?

(Testimony of Will McLaren.)

A. It was some time the latter part of March, the middle of March, along there some place.

Q. That would be from the middle to the latter part of March?

A. Yes. It was pretty well froze. We was feeding cattle there. That river was deeply froze. I was feeding cattle there, up till about the 20th of March. There was still ice in the river then.

Q. Then what time did the flood waters come?

A. The flood waters come between the 5th and the 10th of April.

MR. WOOD: You are not familiar with the whole river?

A. No, sir."

WILL McLAREN,

A witness for the defendant William Hanley, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Wood:

"Where do you live?

A. I live near Burns.

Q. Harney County?

A. Yes, sir.

Q. How long have you lived there?

A. 18 years, I think.

Q. You are a son of George McLaren, that just testified this morning?

(Testimony of Will McLaren.)

A. Yes, sir.

Q. You have some property of your own out there, haven't you?

A. Yes, sir.

Q. What section is it in?

A. East half of 15.

Q. Did you ever work for Mr. Hanley of the William Hanley Company?

A. Yes, sir.

Q. At what time?

A. I worked for him, I don't know exactly what time, but very near all the time, off and on all the time.

Q. What was the general nature of your work?

A. Putting up hay and feeding it out.

Q. Did it have anything to do with the water?

A. Yes.

Q. Such as what?

A. Putting in dams, and helping fix levees, and that.

Q. Did you ever have anything to do with helping to keep the banks of the river in repair?

A. Yes.

Q. Did you ever get any orders at any time to cut the banks of the rivers, to let the water out?

A. No, sir.

Q. Did you ever do it?

A. No, sir.

Q. Did you ever use the banks of the rivers as a part of your irrigation system out there?

A. No, sir.

(Testimony of Will McLaren.)

Q. Did you see the Hanley drain ditch at its head this spring?

A. Yes, sir.

Q. About what time?

A. About the 1st of March.

Q. What was the condition of it?

A. It was full of ice, and backed up water in it.

Q. Was it open?

A. Yes, sir, it was then.

Q. Did you see it any subsequent time, any later time?

A. No, not this year.

Q. Where did you find the boards of the drain ditch at that time, when you went up there, the boards for stopping the —

A. The ones that was in it was floated down against the ice, about ten feet below the dam.

Q. What did you do with them?

A. I took them out and tried to put them back in, and they would not stay, and I put them on the bank.

Q. Why wouldn't they stay?

A. The water and ice had backed up there, there was no current to hold them down.

COURT: That was about the first of March?

A. Yes, sir.

Q. What are your instructions about that ditch, the drain ditch?

A. About keeping it closed?

Q. Yes.

(Testimony of Dave McLaren.)

A. My father, he was the one told me to go up there and shut it up.

Q. Who told you?

A. My father. He told me to go and shut it up.

CROSS EXAMINATION.

Questions by Mr. Treadwell:

When did your father tell you to shut it up?

A. About the 1st of March somewhere.

Q. You are talking about this same trip that you took then?

A. Yes sir."

DAVE McLAREN,

A witness for the defendant William Hanley, testified as follows:

DIRECT EXAMINATION:

Questions by Mr. Wood.

"Where do you live, Mr. McLaren?

A. Near Burns.

Q. Are you a son of George McLaren, that testified here this morning?

A. Yes, sir.

Q. Have you got any property out there yourself?

A. Yes, sir.

Q. Where is it situated?

A. About four miles east of Burns.

(Testimony of Dave McLaren.)

Q. It is not on the river?

A. No, sir.

Q. How long have you lived out there?

A. I have lived there about five years. I have lived in the valley for 15 years.

Q. And have you ever done any work on the Hanley ranches in assisting your father?

A. Yes, sir.

Q. What character of work?

A. I have helped with the haying on the ranches, put up the hay.

Q. Have you ever helped about taking care of the water and the dams?

A. Not very much—some.

Q. Did you ever help about on the river banks, keeping them in repair?

A. I have helped fix up one place.

Q. Did you ever make any cuts in the river so as to let water out for irrigating?

A. No, sir.

Q. You say you have made repairs?

A. Yes, sir, helped build a cut up.

Q. Build the cuts up. How was the ice in the river this year, as compared to most years?

A. Well, I was never over the river, but I have been out along there, and it was froze solid. I never seen it froze solid before.

(Testimony of Dave McLaren.)

CROSS EXAMINATION.

Questions by Mr. Treadwell:

Q. Where was the cut you filled up?

A. Just about the middle of Section 27.

Q. On which side?

A. Do you mean on which side of the river?

Q. Yes.

A. On the east side of the river.

Q. Describe the cut.

A. Well, it was a place about 10 to 15 feet wide, and we took and plowed a lot of sod there, and took a sled and carried it in there, and made an embankment about five feet wide there.

Q. How was the cut made?

A. It looked like it just washed out of there.

Q. When did you fill it up?

A. About two years ago.

Q. Has it been opened since?

A. No, sir.

Q. No water gone out there at all?

A. Not without the muskrats dug a hole through it.

Q. How is that?

A. Not without the muskrats dug a hole through it."

(Testimony of George W. Young.)

GEORGE W. YOUNG,

One of the defendants, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Webster.

“Is there another dam in above, or just near the north line of the section?

A. Yes.

Q. What is that dam called?

A. Well, they call it the Young dam. It is really the Hanley dam.

Q. What section is that in?

A. That is in Section 19.

Q. Just above there?

A. Yes.

Q. You have it shown on your map there, have you?

A. Yes, sir.

Q. Point that out to the judge, if you please. Where is that?

A. Right there. (Pointing to diagram.)

Q. Just above the section line there?

A. Yes.

Q. Who put that dam in there?

A. Well, I myself and some of Mr. Hanley's men.

Q. And who owns the dam? Whose is it?

A. It belongs to Mr. Hanley.

Q. Do you claim any interest in that dam at all?

A. No, sir.

Q. Who uses that dam?

(Testimony of George W. Young.)

A. Why, the Hanley Company, I suppose.

Q. For what?

A. For the irrigation of Section 29.

Q. For the irrigation of 29?

A. Yes.

CROSS EXAMINATION.

Q. After the court passed on that other contempt matter, did you sell this dam to Mr. Hanley?

A. The sale was made before the court proceedings were begun.

Q. Before the contempt proceeding?

A. Yes, sir.

COURT: Was Mr. Hanley a party to that other contempt proceeding?

MR. TREADWELL: I think not, your Honor.

MR. WOOD: No, sir.

Q. How long before the other contempt proceeding, had you sold Mr. Hanley the dam?

A. About two years, I think.

Q. Had you sold him all interest in it, or just an interest in it?

A. Sold him all interest.

Q. So you didn't have any dam at all?

A. No, sir.

Q. You first constructed it yourself, and then you sold it to him?

A. Well, I constructed it with the understanding that it would be used for the irrigation of Section 29.

(Testimony of George W. Young.)

Q. Well, Mr. Hanley, says he never had anything to do with it until after the contempt proceeding, when he bought it from you, to settle an account for some hay.

MR. WOOD: I ought to correct that, Mr. Treadwell. It is my mistake in Mr. Hanley's affidavit.

MR. TREADWELL: It is not in his affidavit—it is in his testimony right here in court, where he disputes his affidavit, and makes a new version.

MR. WOOD: It may be that I am wrong. I know I got it wrong in the affidavit.

Q. Well, now, how about it, Mr. Young? What is the fact?

A. The deal was made long prior to the contempt proceedings.

COURT: What defense did you make in the contempt proceeding, then?

A. I alleged that the dam belonged to Mr. Hanley.

Q. You alleged in that proceeding that the dam belonged to Mr. Hanley?

A. Yes, sir.

COURT: Was that tried out?

A. Yes.

MR. WOOD: I want to ask some questions. There seems to be a difference here between your testimony and Mr. Hanley's.

Examination by Mr. Wood:

Q. When did you say he bought the Young dam?

A. It was in 1909.

(Testimony of George W. Young.)

Q. He said something about making a trade, as I understood it, for hay that you used. Was that part of the consideration?

A. That was part of the consideration. The hay I had got, afterwards.

Q. What year was that?

A. Well, I think that was two years ago or three—two or three years ago.

Q. Well, if he had bought you out in 1909, what was the occasion for any further consideration?

A. Oh, that consideration was earlier than that.

Q. It was what?

A. That consideration was earlier than that. It was not all completed.

Q. Well, he bought you out, then; you did have some sort of interest in the dam?

A. Well, technically I did.

Q. What was that? How did that interest accrue? How did you get it?

A. In the first place?

Q. Yes.

A. Well, it was not all paid up.

Q. I know, but I say, how did you get your interest originally in the dam?

A. Well, I furnished the timbers and done the work.

Q. You built the dam?

A. Yes.

Q. I see. All right."

(Testimony of Carey Thornburg.)

CAREY THORNBURG,

One of the defendants, testified as follows:

DIRECT EXAMINATION:

“Q. The water goes out on 31, out of that 31 or Luig dam,—I don’t care which you call it; what the name of it is don’t make any difference to me—does that take the water out on 31?

A. Yes, sir.

Q. And it is used on 31?

A. Yes, sir.

Q. Where does the water go off 31?

A. Well, it runs down through 5, irrigates Section 5, a portion of it.

CROSS EXAMINATION.

Questions by Mr. Treadwell:

Mr. Thornburg, you say the water from the Luig dam goes onto 31, and then on down onto Section 5?

A. Yes.

Q. I take it from that, it never gets onto Section 6?

A. Yes, a portion of it does.

Q. Gets onto Mr. Luig’s land and irrigates it, doesn’t it?

A. Yes.

Q. Why did you forget that?

A. I wasn’t asked by you.

Q. You were asked where it went.

A. I said a portion of it went on 5, didn’t I? That’s what I said.”

(Testimony of William Hanley.)

WILLIAM HANLEY,

The defendant was re-called and testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Wood:

“Mr. Hanley, in your affidavit is a statement that you didn’t know of the contempt proceedings against the Young dam when you purchased it. Then you took the stand, and, as I understand it, you testified that you knew, in a general way that there had been contempt proceedings. Then you said that you had taken over Young’s interest in the dam, on some hay account. Now, I understand from Mr. Young’s testimony that you took over the dam earlier than that, and before the contempt proceedings. Having heard him, is your memory refreshed so that you can state anything more definitely about the facts?

A. Mr. Young said that I had taken it over in 1909, and refers me to Mr. Billie Miller, my attorney at the time, that he had taken a bill of sale, and there is a bill of sale of it recorded in the records of the county clerk’s office at Burns. Now, I would say that I want the court to understand that my interest in that dam is for Section 19, and the rights that I claimed for Section 29. They corner with one another. And in the part of constructing it, why, I guess probably I had an interest in it. But at any rate, I had paid a matter that Mr. Young had told me, and refreshed my memory on it, and that was some money that he was owing on the lease of

(Testimony of William Hanley.)

Section 29, that I had paid that. And I remember paying that to the Road Company, and probably in my hay statement, that was an overplus of another payment, and I probably put in something when the dam was constructed. But the dam was moved up to Section 19, and the rights in there I claim for Sections 19 and 29, I claim for the Harney Valley Improvement Company.

Q. Were they in the decree?

A. The Harney Valley Improvement Company is—19 and 29 is not in the decree.

Q. How great a territory and area do these properties of yours cover, that you have charge of up there?

A. The William Hanley place has about 10,000 acres in it.

Q. I mean, in meridian distances, what distance apart? What territory do you have to cover?

A. About 300 miles to go on the properties of the William Hanley Company, and the Blitzen and Harney Valley Improvement Company.

Q. Are you the active manager?

A. I am.

Q. Do you make sales of cattle, and everything?

A. Yes, sir.

Q. You are away a good deal, are you?

A. Yes, sir, I am.

COURT: Mr. Wood, do I understand that Mr. Hanley's testimony includes Section 19, along with the transfers and deeds that he acquired indirectly from Altschul?

(Testimony of Henry Luig.)

MR. WOOD: I would have to ask him myself. I don't remember these things very well.

Q. Was 19 acquired from Altschul?

A. 19 belonged to the Harney Valley Improvement Company.

Q. But it is an Altschul title?

A. It is an Altschul title.

Q. Was it ever in the decree?

A. It was never in the decree.

MR. MINOR: Was that leased at the time of the decree by Levens?

A. Yes.

MR. TREADWELL: Expressly provided he had a lease of it only.

MR. WOOD: Mr. Treadwell reminds me of something. That is correct. I remember myself making a lease of the section to Levens, and he was a party as lessee at the time of the decree."

HENRY LUIG

Defendant, testified as follows:

CROSS EXAMINATION:

Questions by Mr. Treadwell:

"Mr. Luig, you and your brother Caspar put the first dam in there, did you not, in Section 31?

A. Oh, no. Sam Voegtly.

Q. Voegtly owned your place before you got it?

(Testimony of Henry Luig.)

A. Yes, he had a section.

Q. When did Voegtly put it in there?

A. In 1886. Henry Voegtly put that dam in in 1886.

Q. When did you get it—you and your brother?

A. I can't tell you exactly.

Q. About when.

A. He proved up on the land, and then he sold it.

Q. He proved up on the ranch and sold it to you?

A. Yes.

Q. Do you know how long ago?

A. I think it took three years.

Q. Two or three years after 1886?

MR. WEBSTER: He says it took three years to prove up on it.

Q. You and your brother, until your brother's death, used the dam, did you, until that time?

A. Yes.

Q. Since your brother's death, you have used it every year, have you?

A. Yes. We have put a new dam in.

Q. When did you put the new one in, Mr. Luig?

A. I think in 1905 or 1906—something like that.

Q. When you put in the new dam, did you have any talk with Mr. Hanley at that time?

A. I don't know — I wasn't here — if the other brother put that dam in. I went to Washington. After I came back, the dam was there.

Q. Didn't you give any interest in it when you put in the new one, to Mr. Hanley?

(Testimony of Henry Luig.)

A. I don't know.

Q. You don't know?

A. No.

Q. Well, when you built the first one, you didn't ask Mr. Hanley anything about it, did you?

A. No.

Q. You just went there and built it?

A. Yes.

Q. You didn't ask the Road Company anything about it, did you?

A. That is what the other brothers say. I don't know nothing about it.

Q. So far as you are concerned, you and your brother simply went there and built that dam, and didn't ask the Road Company anything about it, did you?

A. I believe somebody what owned it went at that time. I don't think they can leave it out. I was not here.

Q. Mr. Luig, you testified just the other day over in the proceeding before Mr. Corcoran, didn't you?

A. Yes.

Q. Didn't you testify then that Mr. Hanley never had anything to do with that dam until you put the new one in, in '4, '5 or '6?

A. Yes.

Q. That is right, isn't it?

A. Yes.

Q. He never had anything to do with it before that time, is that right?

(Testimony of Henry Luig.)

A. So then after other brother was living, he attend to the business. I don't attend to it.

Q. When you built that new dam, did you take Mr. Hanley in with you and have him help you build it?

A. I don't know. The other brother built it.

Q. Didn't you testify over before Mr. Corcoran, that when you built the new dam you allowed Hanley to help you build it, and gave him an interest in it? Didn't you so testify?

A. Hanley helped our —

Q. Hanley helped you rebuild it?

A. The other brother said he did.

Q. Weren't you right there when the dam was rebuilt?

A. No, I was in Washington.

Q. How long did you stay in Washington?

A. Oh, when I come back the dam was built.

Q. When did you first learn that Mr. Hanley had got an interest in it?

A. That is what the other brother said.

Q. Your brother told you when you came back that he had given Mr. Hanley an interest in it?

A. Yes, that he paid half of the expense. If he done it, I don't know. I got nothing to show.

REDIRECT EXAMINATION.

Q. That dam was first built by Peter Stenger, wasn't it?

A. It looked like it was there, before Sam Voegtly.

(Testimony of Henry Luig.)

Q. Peter Stenger took a lease of Section 31 from the Road Company, didn't he?

A. Oh, yes, that is what they say.

Q. That is what you understood?

A. Yes.

Q. Hanley succeeded Peter Stenger in that lease, didn't he?

A. I believe he did.

Q. And Hanley has used that dam right along, hasn't he?

A. Most of the time, yes."

At the close of the testimony the following colloquy occurred between court and counsel:

"MR. WOOD: I am going to urge, irrespective of any testimony the court allowed to come in for illustration, they (the plaintiff) are bound by the allegations of the complaint.

MR. TREADWELL: We will not dispute that.

COURT: That will not be disputed."

Approved:

CHAS. E. WOLVERTON,

Judge.

Filed, November 29, 1915. G. H. Marsh, Clerk.

DEFENDANT'S EXHIBIT "A"

(Copy for Mr. Hanley)

COPY

MILLER & LUX INCORPORATED

1307-1318

Merchants Exchange Building

San Francisco, April 5th, 1915.

Mr. Harry L. Corbett,

Corbett Building,

Portland, Oregon.

Dear Sir:

We wish to take this opportunity of calling your attention to a matter of great personal interest to yourself as well as to our company.

One C. B. McConnell has been making an examination of the acquisition of title from the state, of land in Harney Valley and prevailed upon Governor West to institute a suit against our company to recover some twenty-six thousand acres of land. Much of this land, and particularly the swamp land, was acquired in the same manner that the lands of the Blitzen Company were acquired, and in fact we are informed that much of it was acquired under the same applications of purchase from the State of Oregon. McConnell has stated that he has also made an examination of the acquisition of title by the Blitzen Company, and we also have a personal knowledge that he has done so. He has also stated that he intends to have brought a like suit for the recovery of that land.

We are not at all afraid of the merits of this litigation, but we do object to having our titles questioned by a man who is actuated entirely by personal motives, and we would regret seeing the same done in regard to your company.

We purchased our land from Todhunter and Devine in good faith as you purchased yours from the French-Glenn Company, and the injustice of compelling us to meet a charge of fraud alleged to have been committed thirty years ago is apparent.

We are calling this matter to your attention for the reason that a few days ago when we showed the Governor and members of the State Land Board the true facts of the matter, and the motives that were prompting McConnell, the Board unanimously decided to dismiss the suit. Immediately McConnell began to bring new support to his cause, and, among others, your superintendent Mr. William Hanley, whose interview appears in the Oregon "Journal" of March 28th, 1915.

We can not believe that in order to prevent this man McConnell from pursuing your company you would be a part to any alliance with him as against our company. On the contrary, we know that if you understand the situation you would not have permitted Mr. Hanley to assist in any opposition of this kind, but on the contrary would join with us to do everything that you could to stop this attach upon our rights?

So far as Mr. Hanley, individually or otherwise, may have any litigation with us over water, we are perfectly

willing to fight it out on its merits, but we do not propose to permit him, without protest, to use that as an excuse for joining in an unwarranted attack upon the titles of persons holding large amounts of lands in Harney Valley. Instead of encouraging anything of that kind, you should, and we believe would, do everything in your power to prevent such an attack.

We trust that you will fully appreciate the spirit in which this is written, as we do it with a sincere hope that you will exercise what influence you have to our advantage rather than against us in this important matter.

Our Mr. Treadwell will be in Portland Saturday and would be glad to see you regarding this matter.

Yours truly

MILLER & LUX INCORPORATED

(Signed)

By J. Leroy Nickel

Filed, May 12, 1915.

G. H. Marsh, Clerk.

DEFENDANT'S EXHIBIT "B"

April 20, 1915

Messrs. Miller & Lux Incorporated,

Merchants Exchange Building,

San Francisco, Cal.

Attention Mr. Nickel:

Gentlemen:

My answer to your letter of April 5th has been long delayed owing to a visit to San Francisco and the Fair.

My absence was also responsible for missing Mr. Treadwell on his visit to Portland, and I trust you will accept my apologies for not replying sooner and convey to Mr. Treadwell my regrets at not having seen him.

Taking up your letter in detail, I can immediately say for myself and our company that I have not and will not encourage an attack upon your or any man's land title, regardless of how the same line of conduct might affect my own holdings. If the State of Oregon has seen fit to investigate your title, I know absolutely nothing of the origin of that investigation beyond newspaper reports upon which I do not rely.

My associates and I bought our property in good faith as you say and upon favorable report of our attorneys on abstracts. I feel that I have a perfect right to assume that our titles and your titles are litigation proof. I am not attempting to deny as a general proposition that questions of fraud should not be unearthed for the benefit of the people of this state, but I do not hesitate to affirm that I do not believe that either your titles or our titles are fraudulent or that the question of fraud should now be raised against titles which have passed into our hands in good faith for heavy value and consideration. I believe your titles are much the same as ours are and I am stating my position as above because I believe it to be exactly Mr. Hanley's position as well as my own.

I think the article you enclose has nothing in it from which I can infer that Mr. Hanley was attempting to pass on the legitimacy of your land titles. I shall not

attempt to conceal what has become through various legal actions common knowledge, namely, that Mr. Hanley has the feeling that the general policy of the Pacific Live Stock Co. in Oregon has been unneighborly and narrow toward him and has been a policy of exclusion as to the general settlement of the country, but as far as I am informed that is as far as his sentiment goes.

I do not say of course that he is right in this assumption, but a long course of years has imbedded this belief in his mind. Further than this I have never heard him go, and I am positive that he has no personal animosity against you or your company, and I am equally positive that he would never attempt to stir up official investigation of your land titles in retaliation for any private suit between your company and him. I am satisfied in my own mind that Mr. Hanley is not back of any attempt to stir up trouble for your company.

The article in question quotes Mr. Hanley not in relation to land titles as I read it, but primarily in relation to opening up and settlement of Harney Valley. As you know, he is enthusiastic on the subject of developing the country for settlers. He believes the greatest values lie in that direction. He believes nothing can be done without a railroad, and he does believe that the policy of your company is opposed to development—opposed to a railroad—and that it prefers to keep the country as an empty cattle range.

I personally hope that this is not the case with you, as I believe the time is past when we can attempt to

exclude settlers from this great region and hold it as a private cattle pasture. Apart from the fact that I do not believe we have a moral right to attempt to shut this country up to settlement and development, I think that you will unquestionably agree with me that greater profits lie in the fullest possible development, for you have seen this work out in your California holdings.

This reply I am making on my own responsibility, but I feel under the circumstances with my kindly feeling toward yourself and my long, intimate and personal connection with Mr. Hanley, that it will be impossible for me not to call the matter to his attention, and I am accordingly sending to him a copy of your letter with carbon of this reply.

I hope you will always be as frank as you have been in this instance and that we may be able to work together for the general good of the Harney country.

Very truly yours,

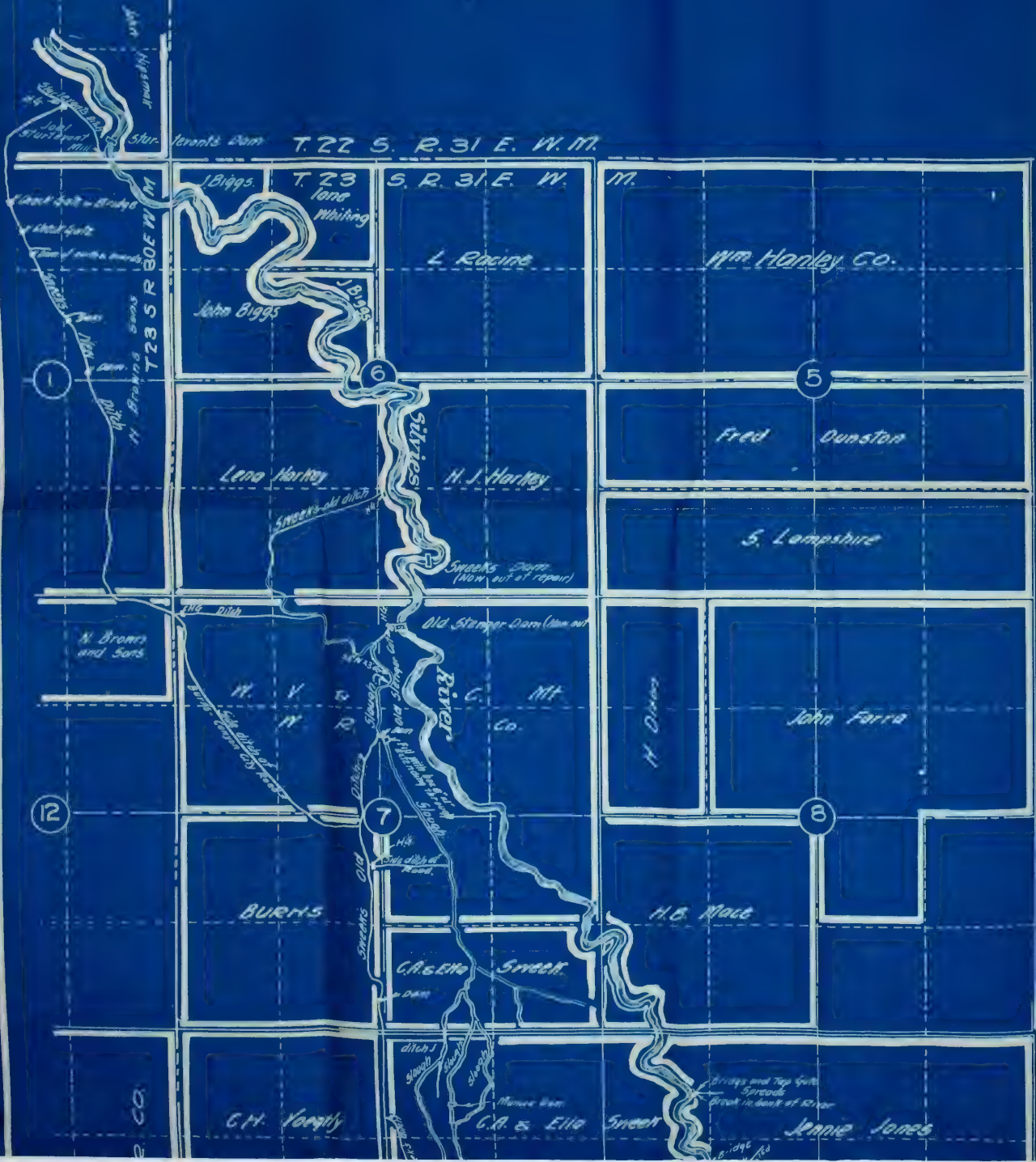
HLC/S

Copy to Mr. Hanley

Filed, May 12, 1915.

G. H. Marsh, Clerk.

36



MAP
OF
A Portion Of Silver River

IN
HARNEY VALLEY, HARNEY COUNTY, OREGON.
TOWNSHIPS 23 S. R. 31 E. 24 S. R. 31 E. & 24 S. R. 32 E. W. 11.

SHOWING
*Ditches and sloughs used in diverting water from River, and
disposition made of water so diverted.*

Scale, 1000' to 1"

Survey begun Nov. 30, 1906 - Completed June 20, 1909.

A. O. Foulmer, Civil Engineer.

Burns, Oregon.

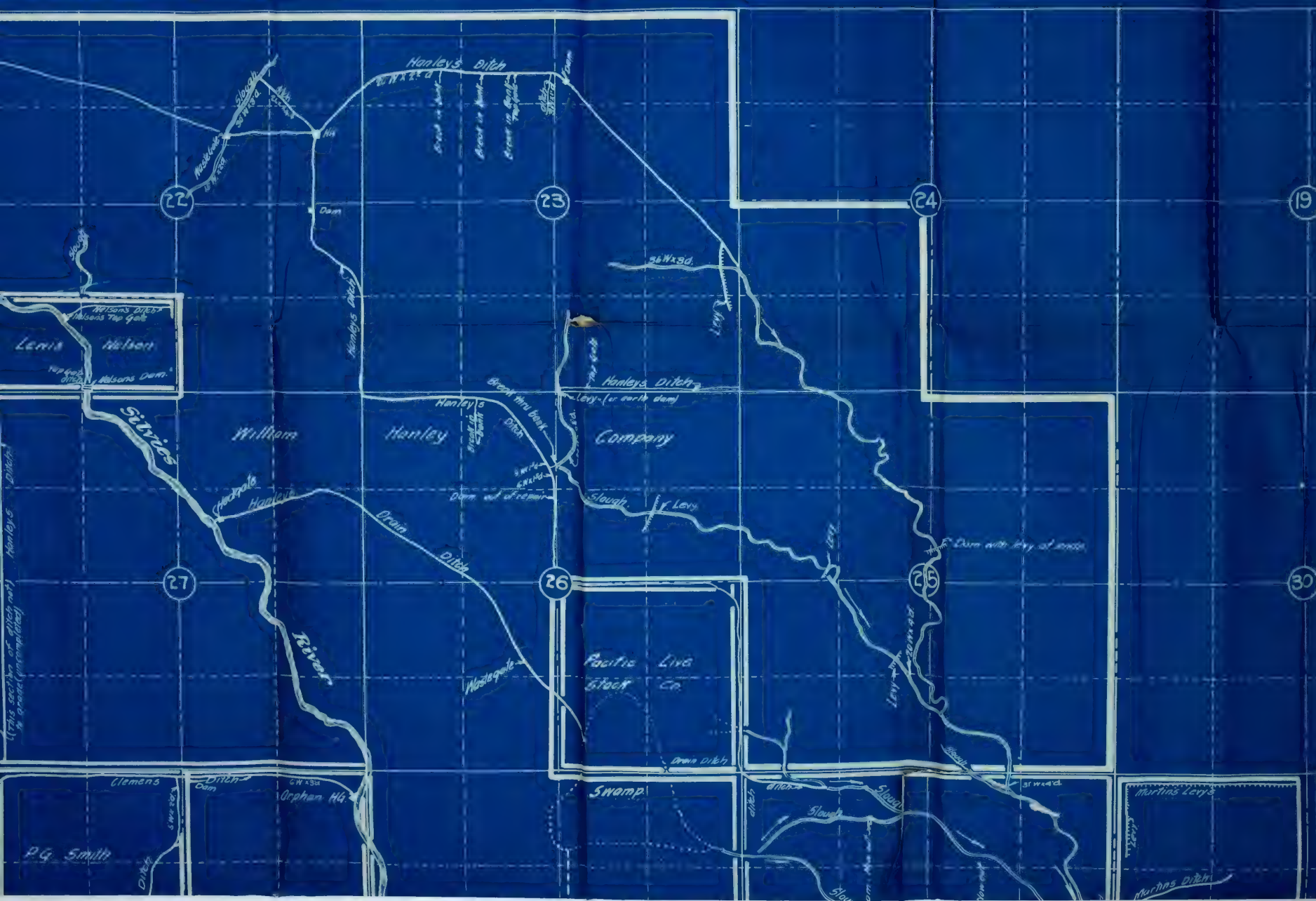
U.S. CIRCUIT COURT

FILED

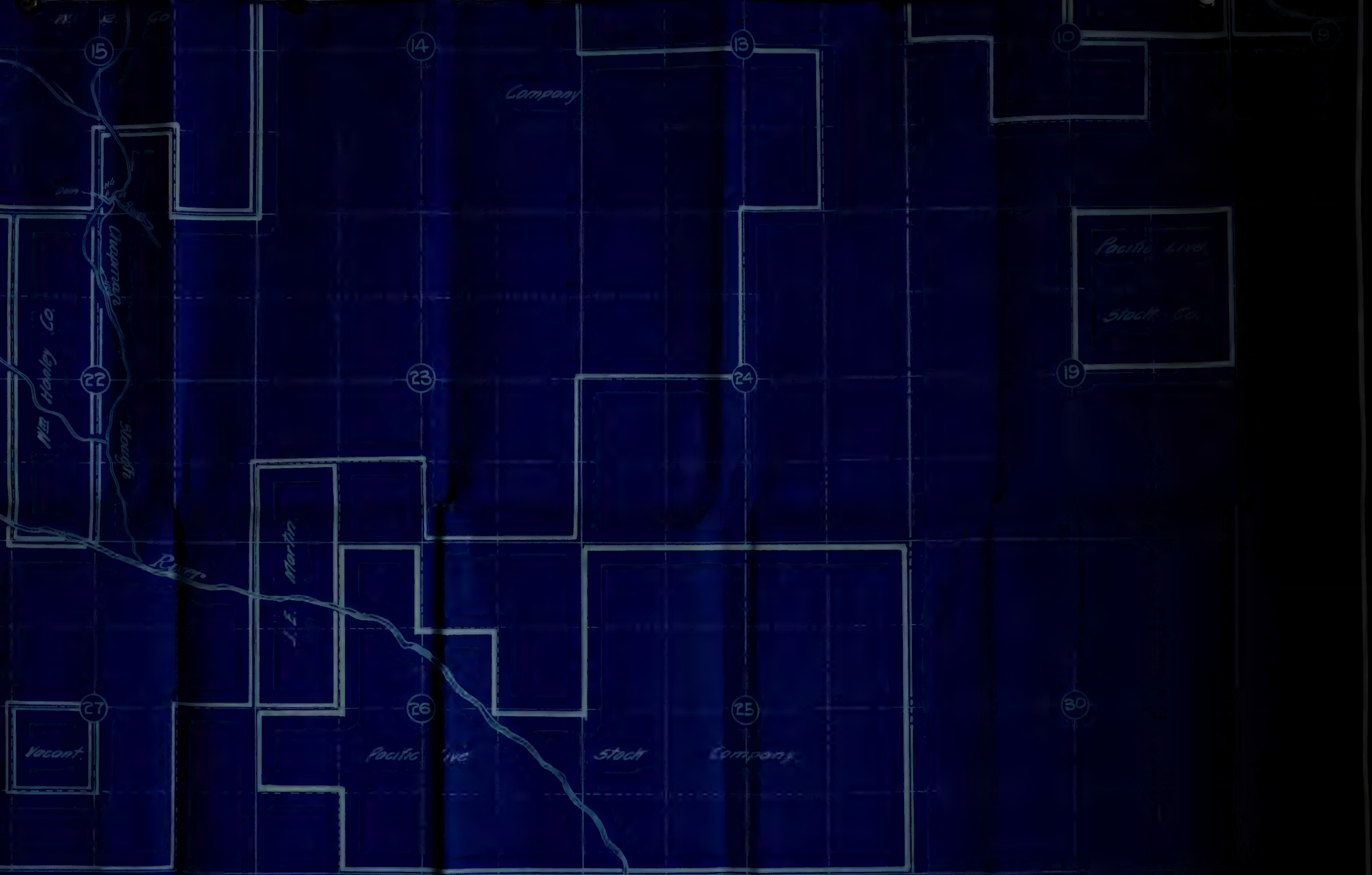
DEC. 17, 1910.

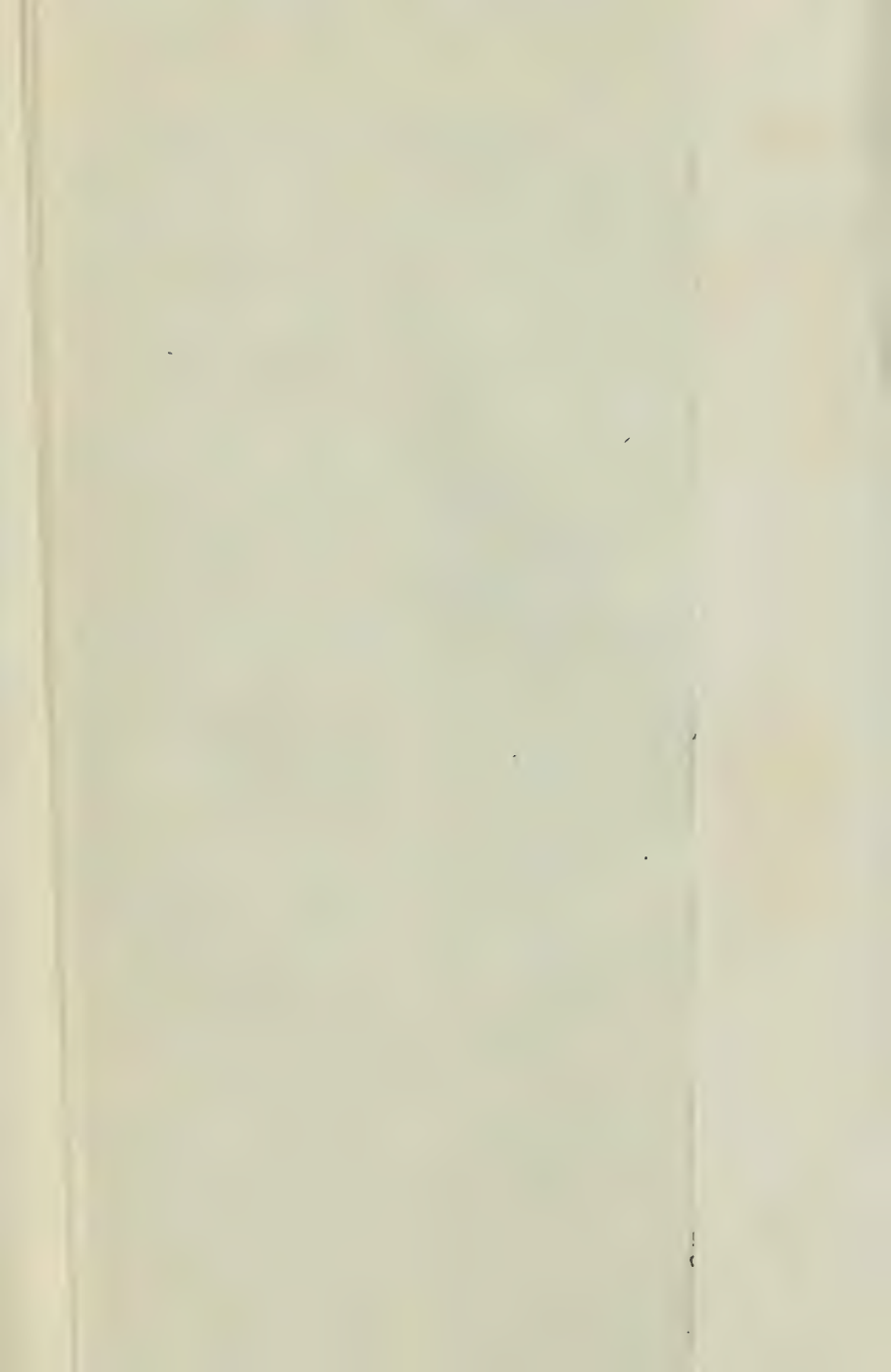
W. H. Marsh, Clerk
District of Oregon.

P. L. S. Co. }
vs. } *Complainants Exhibit 4*
W. D. Hanley }
A. W. P.
S. P. EX.









And, to-wit, on the 21st day of February, 1905, there was duly filed in said Court, and cause an Opinion, by Honorable Charles B. Bellinger, District Judge, in words and figures as follows, to-wit:

OPINION BY JUDGE BELLINGER.

*In the Circuit Court of the United States for the
District of Oregon.*

PACIFIC LIVE STOCK COMPANY,
a corporation,

Complainant,

vs.

W. D. HANLEY, ET AL.,

Defendants.

Teal & Minor for the Complainant.

*Lionel R. Webster and Williams, Wood & Linthicum
for Defendants.*

BELLINGER, J.

This hearing is upon an order to show cause why the respondent should not be punished for contempt of court for violating an order and decree heretofore entered in this cause. The decree in question was entered on stipulation of the parties in a suit by the plaintiff against Hanley and others to restrain the diversion of water from Silvies river in this state. It was alleged in the complaint that Hanley had dug ditches and constructed drains in said river and "That by means of said dams the

water in the main channel and in the forks of said Silvies river have been impounded and caused to spread over a great area and made to overflow the banks of said river and to flow into said ditches, whereby the same has been diverted entirely away from the channels of said river and of its forks and has been wastefully distributed over a large area of country, and by means of evaporation, seepage, absorption and diversion from said channels, said water has become wholly lost and your orator has been deprived of the use thereof."

The decree affecting Hanley is as follows:

"That the defendant W. D. Hanley may maintain his dam in the East Fork of Silvies river where the same is now constructed and build on and across said river in section 21, township 23 south, range 31 east, Willamette meridian, and may maintain his ditches leading from said dam as the same are now constructed and built, during the irrigating season of each year and at no other time, the said irrigating season to begin after the Spring Flood of each year and from the 5th day of May of each year, and shall continue from said time until the 1st day of July of each year; and the said defendant W. D. Hanley may retain the waters of said Silvies river during said irrigating season as above described and by means of the dam as the same is now constructed in said river, may divert and use so much thereof by means of his dam and of the ditches leading therefrom as shall be necessary to irrigate section 21 and 27 in township 23 south, range 31 east of the Willamette meridian, also all of section 22, except the south half of the southwest

quarter of said section, and also the west half of section 26, also section 35, sections 23 and sections 25 in said township and range.

“That the said W. D. Hanley may maintain his ditch constructed across a portion of the land above described leading out of the east fork of Silvies river on the east side thereof on the south half of section 27 above described and extending southeasterly until it enters into and upon the land of the complainant on or near the southwest quarter of the southeast quarter of section 26, township 23 south, range 31 east, W. M., but shall maintain said ditch for the purpose of draining water from the surface of the land above described and not for the purpose of irrigation.

“If at any time and while the dam of the said W. D. Hanley is open so that it does not obstruct the flow of the water in said river and from natural causes the waters of said East Fork of said Silvies river shall overflow its banks upon the land of the said W. D. Hanley, or naturally run through either of the ditches of the said W. D. Hanley leading from the dam of the said W. D. Hanley first above described, said defendant W. D. Hanley shall have the use and enjoyment of so much of the said water of said river as may come upon his land in the manner aforesaid and during such time as the same may run thereon from natural causes and without any obstruction of the channel of said river.”

The following facts relating to the alleged violation of the decree by Hanley appear from the evidence on the hearing:

First. Hanley has extended the irrigating ditch by which water is diverted from the river in the Northwest quarter of section 21, from a point near the north and east line of section 22, through section 23 to an intersection with a slough in section 24.

Second. He has tapped the ditch known as Hanley's waste ditch, at a point in the southwest quarter of Section 26, so as to divert the water therefrom upon his own land and to prevent it from being carried upon the land of the complainant comprising the southeast quarter of said section and section 36.

Third. In the Northwest quarter of section 35 the river runs in a sharp bend over the line between the land of Hanley and that of the Live Stock Company, upon the land of the latter, and back again in a distance of some five hundred feet. Across this bend, on his own land, Hanley dug a channel through which he diverted the water by means of a check-gate. At the lower portion of this bend he built a solid earth dam in the old channel, so as to keep the water from flowing back upon the land of the Live Stock Company at the lower end of the new channel.

Fourth. On about the line between sections 2 and 3, in township 24 south, range 21 east, there was in the river channel an old check-gate known as the Fennimore check-gate, used to impede the flow of water so as to sub-irrigate the lands further up the river. This gate had become decayed and useless for the purpose intended. Hanley, since the decree in question was en-

tered, having acquired the Fennimore land, put in a new check-gate a short distance above the old one.

The Fennimore interest was not involved in the suit in which the decree was entered, and the rightfulness of this check-gate was not adjudicated. Hanley's act, therefore, in putting in this check-gate is not a matter for which he can be required to answer in this proceeding.

I am of the opinion that the extension of the ditch in question in section 23 is not a violation of the decree. The testimony is to the effect that the dam in the river at this point has not been raised, but is such a dam as the decree permits Hanley to maintain, so that the loss of water by evaporation, seepage and absorption resulting from this dam, and the diversion of water caused by the dam to flow into the ditch in question, is not a ground of complaint.

The decree provides that Hanley may maintain his ditches "as the same are now constructed and built," etc., and may divert and use so much of the water of the river, by means thereof, as shall be necessary to irrigate sections 21 and 27, etc., and all of section 22 except the south half of the southwest quarter, and also the west half of section 26, also sections 35, 23, and 25, in the township in question.

Is this decree violated by the extension which Hanley has made of the ditch in sections 21 and 22? Mr. Gilcrest, the manager of the complainant, when interrogated as to the effect of the extension of this ditch upon the company's lands in sections 36 and 26, answered,

"They have been largely deprived of water this year. An exceedingly light crop of hay grew in those two fields this year. Mr. Hanley kept the water away from those this year.

Q. By what means did he keep the water away from those two?

A. By dams across his so-called waste ditch, and using that ditch for irrigation instead of drainage.

Q. Has he used that waste ditch for irrigating during the past season?

A. He has.

Q. To what extent?

A. The capacity of the ditch.

Q. I want to ask this question: I think you possibly didn't understand it: I understand that Hanlay's upper ditch has been extended by him since the decree was entered in this cause?

A. Yes, sir.

Q. Now the water from this upper ditch flows, as I understood from your testimony, into this extension?

A. Yes, sir.

Q. What effect does that water flowing into that extension have upon your use of the waters from that ditch on your sections 26 and 36?

A. It keeps the water away from our sections 26, the portion of 26 that we own, and 36; but we have no interest in that ditch of his."

It is not clear from this testimony that the extension in question constitutes a grievance to the Live Stock Company. In one part of this testimony the witness says

that the Company's lands in sections 36 and 26 are deprived of water by dams across the waste ditch, while further on, in answer to a leading question, he says that the extension of the upper ditch keeps the water from these lands, and he adds "but we have no interest in that ditch of his." In his cross-examination the witness testifies that the extension carries the water farther away than it was formerly carried, so that water that formerly found its way to the company's lands in 26 and 36 is carried farther eastward and finally crosses the northeast quarter of section 36. It appears from the testimony that the extension complained of is through the upper part of section 23, and is practically confined to that section, the end of the extension being about on the line between that section and section 24. Sections 22 and 23, and the upper half of section 26, and all of section 25, are irrigated by water diverted through the ditch in section 21. The decree definitely secures to Hanley the right to divert water by this ditch to irrigate all this land, and he has a right to make any extensions in the ditch to that end. The extension facilitates the irrigation of section 23, and the water that may flow into the Embree Slough at the end of the extension is necessarily carried on to section 25. From what appears in the case, Hanley has the right to have the water from this ditch carried farther eastward than formerly if necessary or convenient in the irrigation of the land provided for in the decree. While it provides, as stated, for the irrigation of specific lands belonging to Hanley by means of this ditch, the decree makes no provision for the use of any of this water by the Live Stock Company, and this is in

keeping with the statement of Gilcrest that "We have no interest in that ditch of his" (Hanley's). An interest in the ditch and an interest in the water carried by the ditch cannot be distinguished. A property or right in a water ditch necessarily has reference to the water which flows through it, and the inference from this testimony is that the complainant has no interest in the water which Hanley diverts from the river by means of this ditch. The effect of the decree is merely to fix the quantity of water that may be diverted by Hanley, by restricting the size of the ditch and the height of the dam at this point, and limiting the area to be irrigated by the water diverted by these means. It is solely a question as to the quantity of water that Hanley may divert from the ditch in question. He is entitled to have such quantity carried by the ditch, as it was when the decree was entered, as will suffice to irrigate the land described, and there is nothing to show that he has at any time exceeded this quantity.

The act of Hanley in tapping the ditch known as Hanley's waste ditch was authorized, according to Hanley's testimony, by Gilcrest, manager of the Live Stock Company. The fact as to this is not material, however, in view of the testimony of Gilcrest, which is to the effect that the use of this ditch for irrigating purposes by Hanley had practically no effect on the complainant's use of the water for irrigating purposes during the past spring and summer. This witness says: "This was an unusually high water year, and there was ample water—I am bound to say—came down for making a hay crop this year. It was an unprecedented year for water.

Water went over the dams. The dam was unable to hold it back. His ditch was unable to carry enough water away from the river channel to deprive the lands below there of water for a crop this year." By the terms of the decree Hanley has no right to use this ditch for irrigating purposes, and his act in doing so violates the decree. No injury to complainant resulted from such use, and under the circumstances none could result, and where injury was impossible none could have been intended.

The acts of Hanley in cutting off the loop in the river between sections 34 and 35, by digging a new channel and placing dams in the old channel, were violations of the decree. These acts are explained by Hanley, who testifies that what is known as the Orphan headgate, situated in the loop and upon the land of the Live Stock Company, had become so much out of repair that the water of the river was being diverted thereby, so as to deprive him of the water to which he was entitled for irrigating lands lower down the river; that the Live Stock Company refused to repair such headgate, and refused to allow Hanley to do so. There is other testimony to the same effect. The complainant's testimony having been previously given, there was no opportunity for it to rebut these statements; nevertheless, I am not at liberty to disregard them, and I believe them to be true. In my opinion, they excuse what was done by Hanley, and upon all the matters presented, the case is not one that calls for punishment. The headgate in the upper end of the loop in question has, in obedience to an order heretofore made, been removed. Hanley on his part is required

to remove the earth dam at the other end of the loop, and he is enjoined from placing any obstruction to the natural flow of water along the old channel in that part of the river. The complainant is required to put the Orphan headgate in repair and so maintain it that the diversion of water at that point shall conform to the requirements of the decree heretofore made.

The order to show cause is discharged without costs to either party.

U. S. Circuit Court, District of Oregon, filed Feb. 21, 1905.

J. A. SLADEN,
Clerk.

And, to wit, on the 1st day of April, 1912, there was duly filed in said Court, an opinion, by the Honorable Robert S. Bean, District Judge, in words and figures as follows, to wit:

OPINION BY JUDGE BEAN.

*In the District Court of the United States for the
District of Oregon.*

PACIFIC LIVESTOCK COMPANY,
a corporation.

Complainant.

WM. D. HANLEY, ET AL.,

Defendants.

Hearing on citation to defendants Sweek, Young, Dalton and Geary to show cause why they should not be arrested for contempt, for a violation of a decree of this court rendered on December 10, 1901, in a suit then pending, brought by the Pacific Livestock Company against W. D. Hanley, et al.

Edward F. Treadwell and Teal, Minor & Winfree,
Attorneys for Complainant.

L. R. Webster, Attorney for Defendants.

BEAN, District Judge:

The decree in question was made in pursuance of stipulation of the parties, and undertook to settle the rights of the respective parties thereto to the use of the waters of Silvies River in Harney County. So far as material in this hearing, it is provided that the defendant Sweek "may maintain his dam in Silvies River where the same is now constructed and built, and may thereby obstruct the flow of the waters of Silvies River, and maintain a ditch in connection with said dam, having a capacity of not to exceed 308 miners' inches of water under a four inch pressure, from the first day of May each year to the first day of July each year, and at no other time or place and to no greater extent than as above set forth."

That "the defendant Mrs. A. E. Young and the defendant George W. Young as her agent, lessee and representative, may maintain one dam in the west fork of Silvies River where a dam is now constructed and built on the lands of the said Mrs. A. E. Young, described

as the northeast quarter of section 30, township 23 south, range 31 east, Willamette Meridian, and the ditches maintained in connection with said dam by the said defendants jointly or severally, and by means of such dam and ditches may obstruct and divert waters from the west fork of Silvies River from the 12th day of May to the 1st day of July each year in sufficient quantities and for the purpose of irrigating the lands of the defendant Mrs. A. E. Young (particularly described in the decree) and may also maintain said dam from the 21st day of July to the 23d day of July each year, both dates inclusive, and by means of said dam and the ditches aforesaid used in connection therewith, during the period last above mentioned, may divert so much of the waters of the west fork of Silvies River as may be necessary to irrigate, during the period last mentioned, such lands as said George W. Young and Mrs. A. E. Young may have in garden and orchard upon their lands above described."

And "that the defendants Green Hudspeth and James Dalton and the intervenor Harrison Kelly may jointly maintain a dam in the west fork of Silvies River in Section 31, township 23 south, range 31 east, Willamette Meridian, as the same is now maintained by them at said point, and which is commonly known as the People's Dam, and may maintain said dam from the 12th day of May to the 1st day of July each year in manner and form as the same is now maintained, and they may also maintain during such period each year a ditch extending from the said dam to the lands of the said Hudspeth, Dalton and Kelly (which are particularly de-

scribed) and by means of said dam and said ditch may during the period aforesaid use and enjoy the said waters in order to irrigate the lands above set forth and in quantities sufficient to irrigate the said lands, but the said ditch shall be so reduced that it shall have a capacity, where the water is taken from the said west fork of Silvies River, of not to exceed 1000 miner's inches under a four-inch pressure."

After thus and otherwise not material on this hearing defining the rights of the parties, the decree provides that the defendants shall be perpetually enjoined and restrained from obstructing or impeding the flow of the water to and upon the lands of the complainant, except as in the decree particularly set forth.

The dam which the defendant Sweek had in the river at the time of the decree and which he was thereby permitted to maintain was damaged about three years ago so that it could not be used, and was repaired by Sweek during the year 1910. It is charged by the complainant that it was not rebuilt the same as at the time of the decree, but that permanent boards not removable were placed across the bottom thereof to the height of about four feet, thereby causing a permanent obstruction to the flow of the water at all seasons of the year in violation of the terms of the decree. I do not think this charge is sustained by the testimony. Mr. Sweek who repaired the dam and Mr. Wallace who assisted him in doing so both testified that the old dam was not torn out but was placed in the same condition as formerly and that no change was made therein which would in

any way increase the obstruction to the flow of the water. The only evidence to the contrary is that of Mr. Foster, a surveyor who made a measurement of the Sweek dam in October, 1899, and Mr. Gilcrest, the superintendent of the complainant. Mr. Gilcrest's testimony is based on his recollection of the size and dimensions of the old dam and not upon any actual measurements thereof, and is not sufficient to overcome the positive and unequivocal testimony of Sweek and Wallace. Foster's measurements were made about two years before the date of the decree and there is no evidence that the dam was in the same condition at the time of the decree as when Foster measured it. Indeed it seems probable that it was changed shortly thereafter because the measurements of Mr. McQuinn, a competent surveyor who had occasion to measure and use the dam in the course of some work he was doing for other parties in January, 1900, correspond substantially with the dimensions of the dam as it is now constructed and in use.

At the time of the decree, Young had a dam across the river with small ditches tapping the river just above the dam and leading down on each side to his garden and orchards, and also a main ditch from the stream on the east side, a short distance above the dam and near the north line of section 30, leading east for about half a mile, through which he used water for irrigation. The charge against him is that in the year 1911, without right and in violation of the decree, he constructed a new ditch or flume on the west side of the river some distance above the dam for the purpose of diverting waters for irrigation purposes, and that after the 23d

of July of that year he suffered to remain in a dam then being used by him the removable boards in two sections thereof, thereby obstructing the flow of the water. Neither of these charges are denied. The claim of Young is that no water has ever been used through the new ditch or flume, and that he took out the removable boards from two openings in the dam on the 23d day of July and that such opening was sufficient to permit an unobstructed flow of the water.

As will be seen from an examination of the decree, Young's rights are clearly stated and defined therein. He has the right to maintain one dam in the river at the place where dam was located at the date of the decree, and the ditches then maintained in connection therewith, and by means of such dam and ditches to divert water at the times and for the purposes stated in the decree. He is perpetually enjoined and restrained from diverting water in any other way, at any other time, or for any other purpose. The construction of the new flume or ditch in 1911, if intended to be used for irrigation, was contrary to the terms of the decree. It was not one of the ditches being maintained by him at the time of its rendition. So also was his failure to remove all the removable boards from the dam after his right to use the water had ceased. It was not for him to say whether the flow of the water was obstructed by his permitting a part of the boards to remain in the dam. The complainant was entitled under the decree to have them all removed and Young could not determine the question whether it would or would not be benefitted thereby.

There is another feature in reference to Young's conduct that ought not to pass unnoticed, although it is not specifically charged as a violation of the decree in the petition filed. His dam went out in 1907. About that time or shortly before he built another dam at the expense of Hanley near his north line and some distance above the old dam, and constructed a new ditch along his north and east line and onto section 29, throwing the dirt therefrom on his side of the ditch making a levee or embankment to prevent his land from being overflowed. He used a part of the water through this ditch for irrigation and permitted the remainder to go down to Hanley's land, and this he clearly had no right to do under the terms of the decree. He claims that since the decree he has changed the character of his cultivation and uses only about 25% as much water as he did at the date of the decree, and he seems to think he had a right to permit Hanley or some one else to use the remainder without violating the decree. But, as already stated, his rights are defined in the decree. By it he is not entitled to any definite quantity of water but only sufficient to irrigate the described lands, and if by reason of a change in the character of his cultivation he now uses less water than he did at the date of the decree, he must let the surplus go down the stream as it is wont to flow, and cannot permit its use by another without violating the decree.

The owners of the Peoples' Ditch at the date of the decree were James Dalton, Green Hudspeth and Harrison Kelly. Hudspeth and Kelly have since died and their successors in interest have not been cited to appear.

Dr. Geary is a son-in-law of Kelly and his wife and her mother have succeeded to Kelly's interest. Geary was cited to appear and show cause why he should not be proceeded against as for a contempt in violation of the decree, but the evidence shows that he has exercised no control over the ditch and has no interest therein. He was the administrator of the Kelly estate from 1905 to April 6, 1907, but is in no way responsible personally for the present condition of the ditch or dams.

The charge in reference to the People's Ditch is that the dam in the river at the time of the decree has been permitted to become out of repair, so that it will not retard the flow of the water at the time the owners of the ditch are entitled to use it, without the placing of manure and other material in and around the dam, and that the headgate of their ditch has been permitted to become out of repair so that the water of the river not only flows through but under and around it, so that it does not regulate and cannot be made to regulate the flow of the water into the ditch.

These charges I think are sustained by the evidence. It is apparent from the testimony of the witnesses and especially from the photographs offered and admitted in evidence that the dam is so out of repair and in a general dilapidated condition. It should be repaired and put in good order. The headgate is also out of repair. It is impossible, in its present condition, to regulate by it the flow of the water through the ditch so that no larger quantity shall flow therein than defendants are entitled to take under the decree. It should

also be repaired and put in proper condition so as to conserve the use of the water. It appears from the testimony that during the summer and fall season and after the time the defendants are permitted to use the water, but a small quantity flows in the river, and if it is obstructed or interfered with, it will not reach the lands of the complainant and it will be without water for domestic and stock purposes. Under the decree it is entitled to the use of all the waters in the stream except such as is awarded to the other parties by the decree, and it is entitled to be protected in its rights.

The order to show cause will therefore be discharged as to defendants Sweek and Geary and they will be awarded costs. The defendants Young and Dalton, however, have failed to observe the terms and provisions of the decree, but as their violation thereof was due probably to neglect rather than to wilfulness, and as this is a civil proceeding in contempt (*Gompers vs. Buck Stove & Range Co.*, 211 U. S. 418), and no damages to complainant are shown, they may purge themselves by paying the costs.

Filed, April 1, 1912.—A. M. Cannon, Clerk.

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States, for the District of Oregon, do hereby certify that I have prepared the foregoing transcript of record on the appeal of William Hanley from the decree of said court entered on August 3, 1915, in the case in which the Pacific Live Stock Company, a corporation, is complainant and appellee, and the said William Hanley and F. L. Mace, H. G. Levens, George Whiting, Thomas Whiting, Ione Whiting, John C. Foley, N. Brown, J. H. Byerly, C. P. Rutherford, C. A. Sweek, M. Cushing, D. M. McMenamy, John I. Newman, Charles Nelson, W. H. Marrs, Manna Marrs, Joseph T. Barnes, William Clark, C. H. Voegtly, George W. Young, Mrs. A. E. Young, P. G. Smith, Green Hudspeth, James Dalton, Hull Hotchkiss, Casper Luig, Mrs. F. E. McGee, Peter Clemens, B. R. Porter, and The Harney Valley Dam, Ditch and Irrigating Company, a corporation, are defendants, and Harrison Kelley is intervenor. That said transcript has been prepared in accordance with the law, the rules of the court, and the foregoing order of court designating the record for said transcript, and the stipulation of the parties, and that said transcript is a full, true, and correct transcript of the record of the proceedings had in said court in said cause upon which said decree was based in accordance with the said order and stipulation as the same appear of record and on file in my office and in my custody.

And I further certify that the cost of the foregoing transcript is \$. for clerk's fees for preparing said record, and \$. for printing said record, and that said cost has been paid by said appellant.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Portland in said District this. day of December, 1915.

.

Clerk.

No. 2722

United States
Circuit Court of Appeals
For the Ninth Circuit.

WILLIAM HANLEY,

Appellant,

vs.

THE PACIFIC LIVESTOCK COMPANY, a Corporation,

Appellee.

PORTIONS OF
ORIGINAL TRANSCRIPT OF TESTIMONY

Printed Pursuant to Praecipes of Counsel for Appellee,* Filed
January 10 and 13, 1916.

Upon Appeal from the United States District Court for the District
of Oregon.

Filed

FEB 4 - 1916

F. D. Monckton,

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United States
Circuit Court of Appeals
For the Ninth Circuit.

WILLIAM HANLEY,

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RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the United States Circuit Court of Appeals for the
Ninth Circuit.*

No.—

WILLIAM HANLEY,

Appellant,

vs.

PACIFIC LIVESTOCK COMPANY (a Corpora-
tion),

Appellee.

Praeipice as to Printing Record.

To the Clerk of the Above-entitled Court:

Comes now the appellee in the above-entitled suit and in addition to the portion of the record already printed requests that the following portions of the transcript of the testimony be printed, to wit:

From line 1, page 1, to line 12, page 9, both inclusive; line 10, page 15, to line 21, page 15, both inclusive; line 1, page 16, to line 29, page 18, both inclusive; line 17, page 20, to line 20, page 22, both inclusive; line 18, page 24, to line 23, page 25, both inclusive; line 9, page 33, to line 25, page 34, both inclusive; line 25, page 36, to line 14, page 42, both inclusive; line 24, page 48, to line 29, page 49, both inclusive; line 24, page 58, to line 20, page 59, both inclusive; line 24, page 67, to line 10, page 68, both inclusive; line 7, page 81, to line 9, page 83, both inclusive; line 21, page 83, to line 6, page 85, both inclusive; line 20, page 88, to line 23, page 93, both inclusive; line 2, page 94, to line 5, page 96, both inclusive; line 1, page 97, to line 28, page 97, both

inclusive; line 5, page 103, to line 23, page 104, both inclusive; line 23, page 112, to line 2, page 113, both inclusive; line 16, page 118, to line 23, page 120, both inclusive; line 12, page 124, to line 2, page 125 both inclusive; line 7, page 133, to bottom of page 136; line 9, page 137, to bottom page 137; line 20, page 146, to line 19, page 153, both inclusive; line 15, page 168, to line 9, page 169, both inclusive; line 6, page 196, to line 3, page 199, both inclusive; line 22, page 199, to line 20, page 200, both inclusive; line 3, page 210, to line 18, page 210, both inclusive; line 1, page 215, to line 27, page 217, both inclusive; line 7, page 230, to bottom page 231; line 2, page 247, to bottom page 247; line 28, page 252, to line 14, page 254, both inclusive; line 25, page 255, to line 6, page 256, both inclusive; line 16, page 257, to line 6, page 258, both inclusive; line 1, page 283, to line 7, page 285, both inclusive; line 27, page 285 to line 11, page 286, both inclusive; line 17, page 286, to line 16, page 300, both inclusive; line 23, page 301, to line 12, page 305, both inclusive; line 15, page 306, to bottom page 307; all of the testimony of Hull Hotchkiss which appears on pages 311 to 323, both inclusive; line 1, page 324, to line 4, page 332, both inclusive; line 13, page 332, to line 21, page 332, both inclusive; line 4, page 333, to bottom of page 334; all of the testimony of James Dalton which appears on page 335 to 341, both inclusive; all of the testimony of Robert Hudspeth which appears on pages 342 to 349, both inclusive; line 1, page 354, to line 8, page 356, both inclusive; line 5, page 358, to line 8, page 360, both inclusive; and line 1, page 363, to line 27, page 364, both inclusive.

The said portions of said record should be printed at the expense of the appellant but if the appellant will not pay for the same the expense thereof will be paid by appellee.

WIRT MINOR,
EDMUND F. TREADWELL,
Solicitors for Appellee.

Received a copy of the within this praecipe 6th day of Jany., 1916.

WOOD, MONTAGUE & HUNT,
By C. E. S. WOOD,
Attorney for Wm. Hanley.

Our printed record has gone down to Ct. Appeals.
C. E. S. WOOD.

[Endorsed]: No. 2722. In the United States Circuit Court of Appeals, for the Ninth Circuit. William Hanley, Appellant, vs. Pacific Livestock Company (a Corporation), Appellee. Praecipe as to printing record. Filed Jan. 10, 1916. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No.—

WILLIAM HANLEY,

Appellant,

vs.

PACIFIC LIVESTOCK COMPANY (a Corporation),

Appellee.

Supplemental Praecept as to Printing Record.

To the Clerk of the Above-entitled Court:

Comes now the appellee in the above-entitled suit and in addition to the portion of the record already printed requests that the following portions of the transcript of the testimony be printed, to wit:

Testimony of W. A. GRIFFING from line 1, page 1, to line 12, page 9, both inclusive; line 10, page 15, to line 21, page 15, both inclusive; line 1, page 16, to line 29, page 18, both inclusive; line 17, page 20, to line 20, page 22, both inclusive; line 18, page 24, to line 23, page 25, both inclusive; line 9, page 33, to line 25, page 34, both inclusive; line 25, page 36, to line 14, page 42, both inclusive; line 24, page 48, to line 29, page 49, both inclusive; line 24, page 58 to line 20, page 59, both inclusive; line 24, page 67, to line 10, page 68, both inclusive.

Testimony of EDWARD F. TREADWELL from line 7, page 81, to line 9, page 83, both inclusive; line 21, page 83, to line 6, page 85, both inclusive; line 20, page 88, to line 23, page 93, both inclusive; line 2, page 94, to line 5, page 96, both inclusive.

Testimony of JOHN GILCREST from line 1, page 97, to line 28, page 97, both inclusive; line 5, page 103, to line 23, page 104, both inclusive; line 23, to page 112, to line 2, page 113, both inclusive; line 16, page 118, to line 23, page 120, both inclusive.

Testimony of BEN NEWMAN from line 12, page 124, to line 2, page 125, both inclusive; line 7, page 133, to bottom of page 136; line 9, page 137, to bottom page 137.

Testimony of WILLIAM D. HANLEY line 20, page 146, to line 19, page 153, both inclusive; line 15, page 168, to line 9, page 169, both inclusive; line 6, page 196, to line 3, page 199, both inclusive; line 22, page 199, to line 20, page 200, both inclusive; line 3, page 210, to line 18, page 210, both inclusive; line 1, page 215, to line 27, page 217, both inclusive; line 7, page 230, to bottom page 231.

Testimony of GEORGE McLAREN, line 2, page 247, to bottom page 247.

Testimony of JOHN RYAN, line 28, page 252, to line 14, page 254, both inclusive; line 25, page 255, to line 6, page 256, both inclusive; line 16, page 257, to line 6, page 258, both inclusive.

Testimony of GEORGE W. YOUNG, line 1, page 283, to line 7, page 285, both inclusive; line 27, page 285, to line 11, page 286, both inclusive; line 17, page 286, to line 16, page 300, both inclusive; line 23, page 301, to line 12, page 305, both inclusive; line 15, page 306, to bottom page 307; all of the testimony of HULL HOTCHKISS which appears on pages 311 to 323, both inclusive.

Testimony of CAREY THORNBURG, line 1, page 324, to line 4, page 332, both inclusive; line 13, page 332, to line 21, page 332, both inclusive; line 4, page 333, to bottom of page 334; all of the testimony of JAMES DALTON which appears on page 335 to 341, both inclusive; all of the testimony of ROBERT HUDSPETH which appears on pages 342 to 349.

Testimony of HENRY LUIG, line 1, page 354, to line 8, page 356, both inclusive; line 5, page 358, to line 8, page 360, both inclusive.

Testimony of JOHN RYAN, when recalled, line 1, page 363, to line 27, page 364, both inclusive.

The said portions of said record should be printed at the expense of the appellant, but if the appellant will not pay for the same the expense thereof will be paid by the appellee.

WIRT MINOR,
EDWARD F. TREADWELL,
Solicitors for Appellee,

[Endorsed]: No. 2722. In the United States Circuit Court of Appeals, for the Ninth Circuit. William Hanley, Appellant, vs. Pacific Livestock Company (a Corporation), Appellee. Supplemental Praecipe as to Printing Record. Filed Jan. 13, 1916. F. D. Monckton, Clerk.

[Testimony of W. A. Griffing—Direct Examination (Portions of).]

Portland, Oregon, Saturday, May 8, 1915, 9:30 A. M.

Saturday, May 8, 1915, 9:30 A. M.

Portland, Oregon,

W. A. GRIFFING, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows.

Direct Examination.

(Questions by Mr. TREADWELL.)

Now, Mr. Griffing, you are a civil engineer, are you? A. Yes.

Q. In the employ of the Pacific Livestock Company? A. Yes.

Q. During the months of March and April, and up

(Testimony of W. A. Griffing.)

to the present time, have you been employed in Harney Valley? A. Yes.

Q. Your work was, there, for the purpose of gathering information, I understand, in connection with the adjudication of the water rights primarily, was it not? A. Yes.

Q. That is what you went there for?

A. Yes, on Silvies River.

Q. During that time, you have taken measurements of the water of the river, have you?

A. Yes.

Q. Would you state, Mr. Griffing, during the months of March and April, what was the highest and lowest flow of the river during that time?

A. The highest flow was 650 second-feet, cubic feet per second. And the lowest flow was in April, or was up in May, rather.

Q. Never mind the exact date.

A. It was 130 second-feet.

COURT.—That was in May? [1*]

A. Along the first part of May, yes, or the last part of April.

Q. What was about the average flow during that period then?

A. It would be about 428 second-feet.

Mr. WEBSTER.—I don't understand that.

A. About 428 cubic feet per second.

Q. Now, Mr. Griffing, have you seen the Government measurements of the flow of the river during the years 1914 and 1913?

A. Yes, I have a copy of that.

*Page-number appearing at foot of page of original certified Record.

(Testimony of W. A. Griffing.)

Q. About what did that show as the flow of the river, during the months of March and April of those years?

Mr. WOOD.—That is strictly not competent.

COURT.—What years was that?

Mr. TREADWELL.—1913 and 1914.

Mr. WOOD.—I don't care about it, if he is very certain of his accuracy.

Q. You have blue-print copies of them?

A. Yes, I got the blue-print copies from the Government.

Q. What was it?

A. I haven't made an average of it, but their highest flow was 1770 cubic feet, ranging from that down to about 300 second-feet.

Q. Now, I call your attention to the dam known as the Luig dam. You know the location of that, do you? A. Yes.

Mr. WOOD.—If you have no objection, let him give the location right into the record.

Q. Will you give the location of that, Mr. Griffing.

A. That is in the southwest quarter of section 31, township 23-31.

Q. It is above the Luig lands, is it? [2]

A. It is above the Luig lands, yes.

Q. Did you make observation of that dam, and if so, when? A. On the 24th of April.

Q. And what condition did you find it in at that time?

A. The boards were all in, and no water going through the dam, but a little around it, about four

(Testimony of W. A. Griffing.)

second-feet going around the dam.

Q. About how much water was there in the river at the dam, and being diverted by it?

A. 48 second-feet.

Q. 48? A. Yes.

Q. So that all the water of that west fork of the river, was diverted by that dam, with the exception of about four feet that went around the dam, and then went down the stream? A. Yes.

COURT.—How much was that in the dam?

A. 48 second-feet above the dam.

COURT.—Made 52 second-feet in the river at that time?

A. Yes, about.

Q. Now, you are sure that was 52, or was it 42, Mr. Griffing? I don't think I want to take the time to consult the notes, but unless you are sure—

A. Well, that should have been, there was about 46 second-feet. It should be 42 second-feet, being diverted by the dam, and about 46 second-feet in the river above.

Q. I don't know that it is material, but I just want to keep the record straight. I think that is what you gave me. A. Yes, that is correct.

Q. Where was that water that was being diverted by this dam going, with reference to the Luig property in section 6?

A. It was going on section 6, flowing all over it.

[3]

COURT.—The water that was being diverted by the dam?

(Testimony of W. A. Griffing.)

A. The water that was being diverted by the dam, yes.

Q. Now, Mr. Luig's house is on that section, is it not? A. Yes.

Q. Did you make an observation of the dam that we refer to, as the Young dam, on the 24th and 25th of April? A. Yes.

Q. Where is the dam located that you refer to?

A. That is the southeast quarter of section 19.

Q. And with reference to the north line of section 30, where is it located?

A. Just north of the north line.

Q. So it is just across the line of the Young property?

A. Just across the line of the Young property, yes.

Q. Did you find this old ditch, that is on this map that takes out on the west side of the river, and goes westerly along the road that is referred to through the Young and Hotchkiss property? A. Yes.

Q. Did you find a new ditch that had been dug from the new dam and cut down into that old ditch?

A. Yes.

Q. Was there any water going from the river directly into the old ditch? A. No.

Q. Was the water going from the river above the dam in the new ditch into the old ditch? A. Yes.

Q. The way the water was flowing, could water flow from the river into the old ditch?

A. No, it could not.

Q. Was the old ditch shut off by a headgate?

A. Yes, it was shut off by a headgate.

(Testimony of W. A. Griffing.)

Q. How high was the water in the new ditch and in the old ditch below where the new ditch came into it, above the water flowing [4] in the river at that time? A. More than 1.8 feet.

Q. As I understand you, Mr. Griffing, the water could not naturally flow into the old ditch at that time? A. No, it could not.

Q. Now, what was the condition of the Young dam at that time?

A. Why, there were flash-boards in the bottom.

COURT.—What kind of boards?

A. Flash-boards, or stop-boards, the water being raised up about a foot higher, or about 1.8 feet above the dam than it was below the dam.

Q. You took the elevation above the dam and below the dam? A. Yes.

Q. And there was substantially that difference in the elevation? A. Yes.

Q. Now, about how far below that do you understand is the location of the old Young dam?

A. About 1,000 feet, I should judge.

Q. Do you know what the fall of the country is in there?

A. It is very close to three feet in a mile there.

Q. Now, where did this water go that was diverted to the west at that time?

A. It went into the ditch, to the old ditch, and then along the county road, passing from one side to the other of the county road in the ditches there, under bridges, and then into the fields of Hotchkiss.

(Testimony of W. A. Griffing.)

Mr. WOOD.—Can't you describe those fields in the record?

A. The Hotchkiss field would be the northwest quarter of section 30, and the Voegtly field would be the southwest quarter of section 30. [5]

Q. Now, those ditches along each side of that county road, about how wide was the surface of the water in those ditches?

A. From 12 to 16 feet wide.

Q. And extending for about what distance from the river westerly? A. About half a mile.

Q. So that the water stood in a ditch on each side of the road, as I understand it, that width you have given, and for half a mile long? A. Yes.

Q. And did that ditch go part way through Mr. Young's land too? A. Yes.

Q. Was Mr. Young right there? Does his house stand right aside of that dam?

A. Very close to it, yes.

Q. Was he actually there present at one of the times you made these examinations? A. No.

Q. Well, I say at one time you were there, was Mr. Young there? A. No, not George Young.

Q. Well, maybe you don't know George Young?
Mr. WOOD.—Here he is.

Q. What Mr. Young was it that was there?

A. No.

Q. It was another Young?

A. Another Young, yes.

Q. Now, do you know the location of an old skel-
eton of a dam known as the Voegtly dam?

(Testimony of W. A. Griffing.)

A. Yes.

Q. Where is that located, Mr. Griffing?

A. That should be in the southwest quarter of section 30.

Q. Same township?

A. Same township and range.

COURT.—Is it marked on the map? [6]

A. Yes.

Q. That is an old wooden structure, is it?

A. Yes.

Q. And what is the total width of that old structure, Mr. Griffing? A. 28 feet.

Q. And what was the total width of the openings in it? A. I believe it was 24.4 feet.

Mr. WOOD.—He can refer to his memorandum.

Q. Refer to your memorandum. You gave me 23½.

A. I will refer to my memorandum. 23½ feet.

Q. That was the openings in the clear?

A. The openings in the clear—clear opening, yes.

Q. What condition did you find that dam in as to having any boards in it?

A. The boards were in; that is, they were in perpendicular, up and down.

Q. Put in perpendicularly across the river?

A. Ends down across the river, yes.

Q. Did you also find a new dam that had been constructed shortly above that?

A. Yes, just close above that.

Q. Will you tell the Court how that had been constructed?

(Testimony of W. A. Griffing.)

A. Been constructed of wood with the wings being filled with broken stone. The upstream side the wings were running diagonally toward the bank, which was at least 14 feet from the edge of the opening.

Q. Well, now, how wide was the wooden portion of this new dam? A. 16.4 feet.

Q. As against 28 feet of the old dam? A. Yes.

Q. How wide were the openings, total width of the openings? A. 12.3 feet,

Q. As against $23\frac{1}{2}$ in the old? A. Yes. [7]

Q. The balance of the dam is constructed, as I understand you, by a rock formation.

A. By a rock formation, broken rock dam.

Q. Did it have the appearance of being newly constructed? This dam? A. Recently; yes, very.

Q. Now, when you made this examination in April of this year, how high were those two dams, approximately, raising the water in the channel?

A. About a foot.

COURT.—What two dams are you speaking of?

Mr. TREADWELL.—That is the old Voegtly dam, with the boards perpendicular, and the new dam that had been put in. That is correct, is it?

A. Yes.

Q. Did you also make an examination of the ditch known as the People's Ditch? A. Yes.

Q. Where is that located?

A. That takes out of the river in the northwest quarter of section 31.

Q. What was the condition of the head of that

(Testimony of W. A. Griffing.)

ditch? A. It was open. The gate was open.

Q. Diverting water of the river? A. Yes.

Q. When was this?

A. On the 15th of April, on the 24th and 25th, 26th.

Q. You saw it on the 15th of April, now?

A. Yes.

Q. And the 25th of April? A. Yes.

Q. And the 25th of April? A. Yes.

Q. About how much water was it diverting?

A. 4.3 second-feet. [8]

Q. Calling your attention now to the other side of the country and the east fork.

COURT.—Who are the owners of the People's Ditch?

Mr. TREADWELL.—Mr. Dalton and Maria Kelly, who is not cited here (being a lady, I didn't cite her), and Robert Hudspeth.

Q. Withdrawing that just a moment. At the time that you went down there, on the last time you went there, on Sunday, and saw the People's Ditch open and carrying that water, did you pass Mr. Robert Hudspeth coming to town? A. Yes.

Q. On a load of hay? A. On a load of hay, yes.

Q. To do that, he would have to cross that ditch, would he not? A. Yes. [9]

* * * * *

Q. Will you produce them, Mr. Griffing. I will first ask you to produce your photograph of the Luig dam.

Mr. TREADWELL.—Witness here produces a photograph which has been numbered "1," and it

(Testimony of W. A. Griffing.)

says "Below Luig dam, Silvies River, looking upstream."

Q. That shows the dam when it was closed, in the condition you found it at the time you have stated in your testimony, does it? A. Yes.

Mr. WOOD.—We have no objection, if he took them, and identifies them.

COURT.—Very well.

Q. I will ask you to produce No. 2, the picture of the Young dam. [15]

* * * * * * * *

Q. By the Young dam, in that question, I mean the dam that you have referred to, immediately above the Young property. A. Yes, sir, in section 19.

Q. Does this show the fall over the dam, as you have testified to it, at the time you saw it?

A. Yes, partially.

Q. It shows part of the fall of the water?

A. Yes, it shows the direct fall of the water from the flash-boards.

Q. Did you also take a picture of the Young old and new ditch? A. Yes.

Mr. TREADWELL.—Witness here produces photo No. 3, "Ditch from Young dam. Small cut to left, takes out above dam. Original ditch takes out below."

Q. I will ask you if the old ditch is the one that shows the water surface.

A. Yes, that is the old ditch.

Q. Is the structure at the end, the headgate that holds the water from running back to the river?

(Testimony of W. A. Griffing.)

A. Yes, holds the water from running back in the river.

Q. Is this ditch the cut above the new dam?

A. Yes.

Q. If this headgate was taken out, if that stop-gate was taken out of the old ditch, would the water run back to the river, rather than run into the ditch?

A. Run back into the river.

Q. Couldn't possibly run from the river into the ditch? A. No, it could not.

COURT.—Do you know how recently that ditch was constructed? A. No, I don't.

Mr. TREADWELL.—They state, I think, a year or two ago, a [16] couple of years ago. I don't remember.

Q. I will ask you now to produce the picture that you took of the old Voegtly dam. (Witness does so.) Does this picture numbered "4" show the actual condition of the Voegtly dam, and the boards in it, at the time that you have testified? A. Yes.

Q. That is taken from above the dam, is it?

A. That is taken from above the dam, looking downstream, yes.

COURT.—What boards do you have reference to there?

A. These perpendicular boards, and there are also short ones in there.

COURT.—Is that the way they have of obstructing the waters, putting boards in perpendicularly that way?

A. That is not the general rule, but that is the way they were in there.

(Testimony of W. A. Griffing.)

COURT.—These boards were put in to hold the brush, were they?

A. They were put in to hold the water. Then there was thrown straw in front of them.

Q. Is there a cross-board across the front also?

A. Yes, there are cross-boards going in front of it.

Q. Now, have you got a picture of that same dam from below?

A. From below, showing both the old dam and the new dam.

Mr. TREADWELL.—This being No. 5, which the witness produces.

Q. That shows both the old dam and the new one, that has been referred to, does it, above? A. Yes.

COURT.—The new dam is above?

A. The new dam is above the old dam.

COURT.—This is the old dam?

A. That is the old dam. [17]

Q. Have you also a picture of the new dam, Voegtly new dam, immediately above this one?

A. The Voegtly new dam, yes.

Q. This is taken from above? A. Yes.

Q. Shows both the wooden part of the structure and the rock fill?

A. That is taken from below there. (Referring to No. 6.)

Q. But it does show both?

A. It shows the wooden structure and the rock fill, yes.

COURT.—This is what dam, now?

A. That is the new Voegtly dam, just above the old one.

(Testimony of W. A. Griffing.)

Mr. TREADWELL.—This is the rock portion, this is the wooden opening.

COURT.—What keeps the water from running through the rock? Earth thrown in above it?

A. Earth thrown in above it.

Q. Have you also the picture of the People's ditch headgate, at the time you saw it diverting water?

A. Yes. (Witness here produces Photo No. 7.)

Q. Does that show the water that was flowing away from the river, and through that People's ditch at the time you mention?

A. Yes, that shows the water at that time.

COURT.—How did that water get through the ditch? Was the headgate raised?

A. The headgate was raised. The lower board, six-inch board, that fits in the bottom, that was nailed on to fish screen, was raised. It shows the fish screen up, on top of the headgate there.

Q. I will ask you if that ditch is regulated by underflow waters, and overflow?

A. It was regulated by an underflow at that time.

[18]

* * * * *

Q. You have two more pictures of that, have you not, Mr. Griffing?

A. I have two more pictures showing it on the 4th day of May, in the morning.

Q. I will take that up before I go any further. Subsequent to the time, that you have testified, did you make a further examination of the Hanley "21" dam? A. Yes.

(Testimony of W. A. Griffing.)

Q. At what time?

A. On the morning of May 4th.

Q. What time in the morning, about, were you there? A. Between 10 and 11 o'clock.

Q. What condition did you find the Hanley dam in at that time?

A. I found all the boards in, and no water passing through at all.

Q. Where was the water being diverted? [20]

A. Diverted on to section 21, and around—it was diverted—ditches on both sides of the river, flowing on to 21, and on to 22, as well.

Q. Did you take a picture which you here produce, No. 11, which shows the boards in that dam, as you have testified?

A. Yes, I took that from downstream, looking upstream into the headgate.

Q. It was stopping all of the water in the river at that time?

A. All of the water in the river at that time.

Q. Did you also take a picture of it from above, showing that the boards were up higher than the water in the river?

A. Yes, I took as far as I could get. I had to lean out over the water. I couldn't get all of it. I got three openings, and all the openings were in the same condition.

Mr. TREADWELL.—That is No. 12.

Q. That was taken likewise on the 4th day of May?

A. That was taken on the 4th day of May, in the morning.

(Testimony of W. A. Griffing.)

Q. Did you also, at that time, take a picture showing the water, flowing out by means of that dam on to the west side of the river, on to section 21?

A. Yes, section 21.

Q. Will you produce that—No. 13? (Witness does so.) That is the water that was being forced out of the river by that dam on to that land, is it?

A. On the west side of the river, yes.

COURT.—This doesn't show the dam.

A. No, that is looking south from the dam over section 21.

COURT.—This doesn't show the opening.

A. No, it shows the water going on to the field, the field being flooded.

Q. Did you also take a picture showing the water that was forced [21] out on that date, on the east side of the river? A. Yes.

Q. Will you produce that? (Witness produces No. 14.) Where was that water forced to?

A. That was forced out in the Hanley ditch—north ditch—what they call the North 21 ditch.

Q. It is what is called the Hanley upper ditch?

A. It is what is called the Hanley upper ditch; on the east side going around his headgate into his ditch, and over onto section 22, and his other lands.

Q. Was the headgate in that ditch open or closed?

A. The headgate in that ditch was closed.

Q. How was water forced into it?

A. The level of the water being raised higher than the adjoining land—

Q. This picture, as I understand it, shows the

(Testimony of W. A. Griffing.)

water flowing directly from the river through what?

A. That is coming up and going around the dam, and then directly into the ditch, just below the headgate in the ditch.

Q. Above this dam of course? A. Yes. [22]

* * * * *

Q. There was some statement in here, Mr. Griffing about a new bridge that has been constructed by Mr. Hanley. Is there such a bridge, and where is it located?

A. Yes, there is a bridge located in Section 27, below the Hanley drain ditch.

Q. How is that constructed, with reference to the bank of the river?

COURT.—How far below the drain ditch?

A. I should judge about a quarter of a mile.

COURT.—Right on the intermediate line of the section?

A. No. I couldn't say, but it is about a quarter of a mile below.

Q. How is that bridge constructed, with reference to the bank of the river?

A. The stringers are below the banks of the river. When the water [24] is high it raises the boards of the bridge up—raises them up. Makes them float.

Q. Have you a picture of that?

A. I have a picture of that, yes.

Mr. TREADWELL.—Witness here produces Photograph No. 16.

Q. Does that show the stringers?

A. No, you cannot see the stringers from that.

(Testimony of W. A. Griffing.)

They are below the surface of the water.

Q. You cannot even see the ends of them on the bank?

A. No. They were completely submerged then at that time.

Q. Do you know how deep those stringers are?

A. No, I do not.

Q. You didn't measure them?

Mr. WEBSTER.—Does that show when that observation was taken?

Q. About when was that observation taken, Mr. Griffing, if you know?

A. That was on the 20th of April.

Q. Did you take a picture immediately above that, to show the effect of that in making the river overflow? A. Yes.

Witness here produces Photo No. 17.

Q. Does that photo that you have just produced, show the effect of that bridge?

A. That shows the effect of the bridge immediately above. [25]

* * * * *

Q. Possibly you have referred to the cattle proposition. Have you, or not?

A. Oh, no, I have not. I found several dead cattle at different times. Yes, at one time I found about 12 or 14 boards, five or six feet long, all wired and nailed together, just above the old bridge, the skeleton of the old bridge, and a quantity of tules and a dead cow up against it. I pulled that out.

(Testimony of W. A. Griffing.)

Mr. WOOD.—Is that the one you have a photograph of here?

A. No, I haven't any photograph of that. .

Q. Now, then, Mr. Griffing, is it a fact, then from the examination that you have made, that these various structures that you have testified to, diverted all of the water of the west fork of the river, with the exception of about four feet that went around the Luig dam, and all of the water of the east fork of the river, with the exception of the water that was taken by the Pacific Livestock Company through the Orphan ditch?

A. Yes.

COURT.—Do I understand that up to the first of May, the Pacific Livestock Company had a right to have that water, all of it come down over its land?

Mr. TREADWELL.—Except such as naturally overflowed the general banks of the river, which, of course, could not be controlled, [33] and such as naturally would flow out of the 21 ditch, if there was no obstruction in the river whatever.

Mr. WEBSTER.—Well, that does not quite—

Mr. TREADWELL.—Maybe I omitted something.

Mr. WEBSTER.—Except as to the Hanley drain ditch. If that is left out of the controversy, that is a statement of the case; but this with reference to the drain ditch is quite another matter.

Mr. TREADWELL.—Well, we will attend to the

drain ditch. I think that covers everything, Mr. Griffing.

**[Testimony of W. A. Griffing—Cross-examination
(Portions of).]**

Cross-examination.

(Questions by Mr. WEBSTER.)

You speak about taking out all of the water of the river, the east fork there, except what the company gets out through the Orphan headgate ditch. You say that takes it all out?

A. What is left in the river after it passes the Orphan headgate was diverted by the dam in section 3.

Q. Yes. You don't mean to say that there wasn't water flowing on past the Orphan headgate though?

A. Yes, there was water flowing on past the Orphan headgate.

Q. That water was taken up, or such of it as was taken up, was taken up by the dam in section 3, down there on the Fennimore property. Is that right? A. Yes. [34]

* * * * *

Q. On the last testimony you gave, you spoke of some 12 of 14 boards that were nailed together, just above the old bridge. When did you see that?

A. That was along the first part of April. The exact date of it, I do not know.

Q. What old bridge do you mean? [36]

A. That is the skeleton of the old bridge in section 27.

(Testimony of W. A. Griffing.)

Q. Well, let us get these bridges fixed. Now, there is a bridge across the river up by Mr. Hanley's barn, isn't there?

A. That is not the bridge. It is the old bridge just below the—

A. I am getting these bridges located. There is such a bridge there? A. Yes.

Q. You don't make any complaint about that, I believe? No.

Q. Then following down the river, you say there is one where the stringers set down in the water?

A. Yes.

Q. That is in 27? A. That is in 27.

Q. That is the next one down the river, below the bridge at the barn, isn't it?

A. No. Nelson has a bridge in there before you get to that.

Q. Nelson. Well, that is not our bridge?

A. No.

Q. You are not charging that up against us, are you? A. No.

Q. So we will leave that out. Then we come to this one where you say the stringers are down in the water. A. Yes.

Q. Then comes the old skeleton? A. Yes.

Q. Away down toward the corner of 27, that is, isn't it?

A. Yes, the lower part of 27.

Q. What does that old skeleton consist of?

A. Old stringers.

Q. How many?

(Testimony of W. A. Griffing.)

A. I never counted them, but I should say at least six.

Q. Are they down in the water?

A. A portion of them.

Q. What portion of them? What do you mean? Some of the stringers, or a portion of some of them, or portions of all of them? [37]

A. Some of the stringers are rotted or broken. I didn't get under the river to examine them.

Q. Fallen down in the water?

A. Fallen down in the water, yes.

Q. That is all of that that is in the water?

A. Yes. No, there is some of those that go clear across that is down in the water also.

Q. How deep are they in the water?

A. They are partially submerged. I didn't see how deep down they were in the water.

Q. That river has very little current, hasn't it?

A. It has very little current.

Q. The river has tules growing along each side of the river? A. Along the bank.

Q. In the river too, aren't they?

A. No, not right in the center. At least, you can't see them now.

Q. Well, now, was it there, you say you found 12 or 14 boards nailed together? A. Yes.

Q. When did you find that?

A. The first part of April some time. The exact date I do not remember.

Q. How were these boards nailed together? Describe that.

(Testimony of W. A. Griffing.)

A. Wire was nailed on to the boards, then the wire would be nailed to the different boards. There would be several of them nailed together, and then wired together, the wire nailed on to the boards.

Q. How was that against you? Was that in the river?

A. That was in the river.

Q. How many boards were there?

A. I didn't count them exactly.

Q. Well, five or six, or two or three? [38]

A. There were at least 12 or 14 altogether, four or five of them in a bunch nailed together; that is, not nailed solidly together—wired together.

Q. What was it like? What kind of structure had it apparently been? Could you tell anything about that?

A. Oh, it might have been a piece of an old fence.

Q. Were they like pickets—the boards you speak of—or how wide or big were they?

A. About six inches wide.

Q. What? A. About six-inch boards, I believe.

COURT.—An inch thick? A. Yes.

Q. Was it put in place against these stringers, or had it drifted down?

A. It had evidently drifted down. It was not against the stringers. It was beneath the stringers.

Q. It was lodged in the river?

A. It was lodged in the river against the tules that are growing on each bank of the river.

Q. Did that produce such an obstruction as you could measure the water that was diverted?

(Testimony of W. A. Griffing.)

A. No, I couldn't measure it at all, because there were too many places.

Q. Too many places. Well, all that water was the water going out and going right down into the Orphan headgate ditch wasn't it?

A. That is the water, yes, a portion of it; some of it was on both sides of the river.

Q. There was some over on the other side of the river, you say? A. Yes. [39]

Q. But all the diversion, practically all the diversion you have told about here was on the west side of the river, wasn't it?

A. All the water that was being diverted onto the west side of the river would have gotten into the Orphan headgate ditch.

Q. And right on the company's property?

A. Yes.

Q. When was it you saw these dead cattle?

A. That was along the first and middle—mostly the first part of April. The exact dates I don't know.

Q. Where were they?

A. They were lodged in different places in the stream, in the current of the river.

Q. Beginning down—where was the first one down below?

A. The first one was tangled up—was just above the new bridge, that you speak of in section 27, below the drain ditch.

Q. The one we speak of where you say the string-

(Testimony of W. A. Griffing.)

ers were down in the water—is that the one you mean?

A. That is the one, yes. The first one was there.

Q. There was a dead cow in there?

A. It was either a dead cow or a dead hog.

Q. Well, now, think about it. Which was it?

You know a cow from a hog.

A. It was one or the other. I don't remember exactly which.

Q. You wouldn't say now which, whether it was a cow or a hog. All right. It was there on the 27th of April? A. No.

Q. Oh, I beg your pardon—about the first of April?

A. That was along during the first part of April.

Q. Where was another one?

A. Below that there was a dead cow, and it was tangled up in this bunch of boards that were wired together, and tules. [40]

Q. Right in there, near where these stringers go across that you speak of? A. Yes.

Q. Down toward the lower edge of 27?

A. Yes, in section 27.

Q. Well, down toward the Orphan headgate? Down toward the line of 27 and 34?

A. Yes, toward that way.

Q. How many cows were there in there?

A. One.

Q. Well, now, where were there any more?

A. There was another one lodged against the old stringers.

(Testimony of W. A. Griffing.)

Q. Just farther down?

A. Just farther down, yes.

Q. That was along the early part of April?

A. That was along the early part of April, yes, sir.

Q. Where was another one?

A. There was another one just above the Orphan headgate. There is a log across the river there.

Q. Just above the Orphan headgate?

A. Yes.

Q. Is that in 27 or 34?

A. It is very close to the corner.

Q. Isn't it, as a matter of fact, in your own section? A. No, it was not in our own section.

Q. Wasn't it? A. No.

Q. Across there in Hanley's section?

A. It was in Hanley's section, yes.

Q. Well, where was there any more?

A. That is all I followed up.

Q. Well, that is all you saw?

A. That is all I saw.

Q. It is all there was, wasn't it?

A. I don't know. There may have been some in the bottom I didn't see.

Q. If there were any more, you didn't see them?

[41]

A. If there were any more, I didn't see them.

COURT.—Do you intend to intimate that some one put those dead cows and hogs in the river?

A. I don't know how they got in there.

COURT.—Or they got in there by accident? You don't know how they got in there?

(Testimony of W. A. Griffing.)

A. I don't know how they got in there, no.

COURT.—You don't know who is responsible for them being in there, if anybody? A. No.

COURT.—That would be the same as to those boards that were wired together, that you speak of?

A. Yes, that would be the same as to those boards that were wired together. [42]

* * * * * * *

Q. The river at the point where the Orphan head-gate is, describes—well, not exactly a circle—but runs around from 27, or perhaps from 35, runs around into 34, and back into 35, doesn't it? Loops around there? A. It makes a loop there.

Q. Hanley owns 35, the company owns 34?

A. Yes.

Q. It makes a loop across from 35 into 34, and then runs back [48] in 35 again, doesn't it?

A. Yes, that is right.

Q. Now, did you notice a cut that had been made at one time across that loop, joining the river above and below on 34? Did you notice that? A. Yes.

Q. You noticed where it left the river in 35 and where it came back to it again in 35, a short distance there, didn't you?

A. I don't know the location of each end of it, but I noticed the cut, yes.

Q. You noticed where the end would connect with the river, didn't you? A. Yes.

Q. Now, taking that river from the place where the cut leaves above, to where it comes back below, I want to ask you whether there is practically any

(Testimony of W. A. Griffing.)

fall to the river at all there? A. I don't know.

Q. All right, sir.

COURT.—There must be some fall to get the water off.

Mr. WEBSTER.—Well, there is a condition there in that country—not only there but otherwheres, that the drifting of the water depends upon getting it started in one direction. You can run it one way, and then throw it back and run the other. It seems running both ways. That is a fact.

COURT.—It is very near level then, so that you can control the water?

Mr. WEBSTER.—It is almost level. In fact when that cut was made there to take that water out of the river, when it would run into the river, it ran right back up the river, and out the Orphan head-gate, and he had to put another dam in the river. That was what caused the contempt proceeding against Hanley. [49]

* * * * * * *

Q. Did you make any observations, or do any work, up in Silvies Valley?

A. Not this year, no.

Q. Not this year? A. No.

Q. Did you formerly? A. Yes.

Q. When? A. Last year. [58]

Q. Have you been up there this year? A. No.

Q. Do you know what amount of water is being diverted up there? A. This year?

Q. Yes.

(Testimony of W. A. Griffing.)

A. I have made no measurements up there, no; not this year.

Q. Did you make any last year?

A. There wasn't any diverted last year.

Q. What is the plan? How much is it proposed to divert? A. About 12 second-feet.

Q. Altogether? A. Yes.

Q. How much of the land is proposed to be irrigated?

A. Well, I think about 2200 acres in all. That is, that has been irrigated—

Q. And will be? A. And is irrigable, yes.

COURT.—Is that land above what you are talking about? A. Yes.

Mr. WOOD.—Yes, before the river gets into Harney Valley at all. It is in the upper valley. [59]

* * * * *

[Testimony of W. A. Griffing—Redirect Examination (Portions of).]

Q. Mr. Griffing, just two or three questions: When you left the ditches in Silvies Valley last year, how did you leave the heads of them?

A. All closed solidly. [67]

Q. And so far as you know, has any water whatever been diverted in Silvies Valley in those ditches this year?

A. No, I think there has not. At least I have been informed of that.

Q. You have had charge of the construction of those ditches? A. Yes.

(Testimony of W. A. Griffing.)

Q. They are still under construction?

A. They are still under construction.

Q. You have given no instructions whatever to open them?

A. Absolutely none. In fact I have given instructions for them not to be opened. [68]

* * * * *

[Letter from Edward F. Treadwell to William D. Hanley Dated March 4, 1915.]

I answered that by letter of March 4th, which read as follows: "Mr. W. B. Hanley, Burns, Oregon. Dear Mr. Hanley: I regret that I was absent from my office when you called, but I gather the general object was, owing to some uneasiness on your part in regard to the Orphan headgate. I certainly hope that that can be operated with due regards to your rights, and it seems to me that our representative in co-operation with your Mr. Sterling could do so [74] without difficulty, and I am writing to the company to try and co-operate with you in every way so as to avoid any possible friction in this matter. I expect to be in Burns about April, and hope to see you at that time. [75]

Very truly yours,

EDWARD F. TREADWELL."

* * * * *

[Testimony of Edward F. Treadwell—Direct Examination (Portions of).]

Q. Now, then, on the 24th of April, I understand—that is the day before you had this talk with Mr. Hanley—you did go down the west fork of the river?

A. Yes.

Q. And visited these several dams? A. Yes.

Q. And saw the water yourself?

A. I saw the water at the Young place just as has been testified to by Mr. Griffing, going on both sides of the road, west of that. That ditch takes out of the river, right at Mr. Young's house, and slightly to the east of Mr. Young's house. Of course, I am not absolutely certain of the ownership, but it would have to go in front of his house, before it could get over into the Hotchkiss and Voegtly property. That road on both sides was flooded, and the water was not only going down through the Hotchkiss land, but it was also backing up in section 19, and flooding backwards. It was so high along the road that it sogged back into section 19. Then on the Luig property—we crossed the river at Mr. Phil Smith's place, and we came down, as I remember it, to the Luig dam. Well, I think I am in error on that. I think on that day, on the 24th, we crossed the river at some point below the People's ditch. There must be a crossing in there. We came back to the People's ditch and then we came down—we found the water all going out on the east side of the river on the lower part of section 31 [81] and we crossed right through into Mr. Luig's property,

(Testimony of Edward F. Treadwell.)

and came right down through his property, I think its full length, and the water was all over Mr. Luig's property, and within a very short distance of his house, which is over toward the river. I could not say how close to the house it would be, that that water would flood, but within what would be called a short distance. It is open country—you can see just as far as you want to. It was a sea of water, covered with ducks and everything of that kind. Now, the next day, on the 25th, when I went over the same ground, I was with Mr. Gilchrist and Mr. Griffing. Mr. Griffing is mistaken when he says that George Young was not there; as I understand, it was George Young that was there, although Mr. Griffing did not talk to him at all, and may not know him. Mr. Young was right there, and saw the water going out through his ditch at the time, or through this ditch at the time; and his house is immediately at the dam, just within a few feet of the dam.

COURT.—How about the People's ditch-

A. On that day we went to the People's ditch and that was in the same condition that it had been before. Now, as we went down on Sunday, we passed Mr. Robert Hudspeth coming up to town with a load of hay from his place; and he could not get to where we saw him without crossing this People's ditch and seeing the water in it. He didn't do anything whatever to shut it off, but was going on to town and said nothing to us whatever when we passed him on the road, of any kind. We also

(Testimony of Edward F. Treadwell.)

went through the Phil Smith place on that day and saw Mr. Phil Smith, and he stated that he helped to build the new Voegtly dam. I think his language was, if I remember rightly, that he [82] helped—I don't want to state anything I am not certain of—I think it is Carey Thornburg, but at any rate he said he helped some one to build this new Voegtly dam. At any rate, he helped on it, is what he stated.

Q. You say new Voegtly dam—do you mean the new Voegtly dam or new Luig dam—which do you mean?

A. No, I refer to the new dam that has been put in immediately above the frame-work of the old Voegtly dam. Mr. Phil Smith stated that he worked on it.

* * * * *

Q. What was the condition of the water down on the company's land near the Island ranch—near the Island ranch house, I should say?

A. Well, I think the superintendent, the foreman, could testify more definitely on that, but on the west fork, there was a very small stream of water—comparatively small stream of water—I should think somewhere between 20 and 30 feet, second feet, of the whole river—flows right past the Island house there. I think we estimated it, guessed at it, that it was between 20 and 30 feet. On the east fork I didn't go down to the places where the company would take the water from the east [83] fork, but I did cross, I think, all of the channels

(Testimony of Edward F. Treadwell.)

that lead from the east fork to what is known as the Island ranch. That ranch is way below this property,—down in this vicinity; I mean this land that is irrigated. I crossed all of the channels that come from the east fork onto the Island ranch, and my recollection is they were all dry. There was no water coming to the company from the east fork on its ranch known as the Island ranch.

COURT.—Do all these sections, or parts of sections, with the circle, belong to your company?

A. Yes, belong to the company. In fact, *al* this land is the company land. I think they were getting no water whatever. Of course I might be in error in that, and be corrected by the foreman, but I don't think there was any coming directly from the east fork.

COURT.—Is all that land irrigated by surface irrigation?

A. All the land in the lower end of the valley is all irrigated hay land. I went all over the hay land there—thousands of acres of it—and I don't think there was ten per cent of that land that had water. I might be mistaken in that, because we drove over it, and it was just a dry hay field—all cut—had been cut the year before; in beautiful shape, but there was very little of it had water on it. But that would be an estimate that I would not want to be bound by, because I think the superintendent or foreman would know better the condition there.

Q. Well, did you have any talk with any other

(Testimony of Edward F. Treadwell.)
of the defendants?

A. Well, not of any that I think is material, particularly. They might want something. Mr. Hudspeth, after we had called his attention to this matter, came to see me, and Mr. Dalton. [84] They both disclaimed any responsibility. That was the substance of our conversation with them, as I remember it. And Mr. Hudspeth also stated that on the next day he—I don't know whether he said the next day, or not—but he said he would see it was closed. I think Mr. Dalton said the same,—The so-called People's ditch would be closed.

* * * * *

**[Testimony of Edward F. Treadwell—Cross-
Examination (Portions of).]**

Q. From which dam is that?

A. From the Young dam.

Q. Did you have any special discussion about the People's dam and ditch?

A. I do not think so, more than the general statement that I have made. Unless I was reminded of it, I would not remember any. I don't hardly think that we went into any further detail as to that.

Q. These other men, Hudspeth and Hotchkiss, really assumed the responsibility for that, didn't they? A. The People's dam?

Q. Yes.

A. Why, no. If they had assumed the responsibility, we [88] would not have had to go after anybody else. But we took Mr. Hanley's word that he was responsible, and brought this proceeding

(Testimony of Edward F. Treadwell.)

against them all. They said—I am perfectly free to say that Mr. Hudspeth stated—if you want it, he will state it in detail—that he stated that he had nothing to do with it; that he had not opened it.

Q. Yes, well, I think they will state that they didn't open it.

A. Mr. Dalton told me the same thing. I was simply in the position—it was their dam and on their property; they could not have crossed it without seeing the water in it. That I know.

Q. Now, who put the boards, do you know, into the People's ditch headgate? The dam.

A. Took the amount you mean?

Q. No, who put them in? At the time you were there, the ditch was closed.

A. It was never closed when I saw it. It was wide open.

Q. But it was closed afterwards?

A. I have since been informed by the affidavit that they closed it on the 26th, after this proceeding was commenced.

Q. Did the dam that diverted the water from the People's ditch have boards in it when you saw it?

A. No, sir, it did not. That is my recollection of it, that it was open.

Q. Is it claimed here that that dam was ever put in place to obstruct the river, that the boards were put in?

A. Not in this proceeding. It was in another proceeding, and the Court held it did obstruct it. The Court ordered them to straighten it out. But there

(Testimony of Edward F. Treadwell.)

is nothing in this proceeding which charges that.

Q. You have omitted to go into that matter. It looks as if it was another matter, but we think that it has connection [89] with this, to show that—

A. I would be glad to go into it, Mr. Wood, and tell you what it is.

Q. I was going to tell you because you are of counsel and understand. We have a belief in our minds that you people hold Hanley responsible for the suit brought against you attacking the title to your lands up there, and that there is a good deal of feeling and bitterness, quite outside of the water question that has grown up, toward Hanley. That is our feeling.

A. You want to get my idea on that?

Q. Yes.

A. Well, I would simply state, Mr. Wood, that that matter simply related to this. One of the parties—not Mr. Hanley at all—who is contesting the water rights of this river, and claiming a large amount of water, caused to be instituted by the state, a suit to recover practically all of the company's property alleging that Todhunter and Devine, some 30 or 40 years ago, acquired it by fraud, etc. We went before the State Land Board and showed them that the suit was a mere—

COURT.—Is it necessary to go into that?

A. I think just very briefly.

Mr. WOOD.—I don't care for it at length, but I want to get the facts from Mr. Treadwell, as far as he knows them, whether there is a feeling against Hanley. I want to show motive.

(Testimony of Edward F. Treadwell.)

A. It will be very brief. I can explain that. The State Land Board announced its decision to dismiss the suit, and the next day quite a number of people began protesting against its dismissal, and among others, Mr. Hanley put a column article, in the form of an interview, in the Journal here, saying that they had us half beaten, and they should be permitted to go ahead and finish the job.

Q. Have you got the interview—the article? [90]

A. I may have it with me, but I am not certain that I have. I don't think I have, in fact. It was in response to that that we objected to Mr. Hanley doing that, by writing a letter to Mr. Corbett calling attention to the fact that the same man was attacking his titles—Mr. Hanley, as we understood it, being associated with Mr. Corbett—that his lands were acquired by the same certificates of purchase as ours were, and we thought it a very unneighborly proposition that Mr. Hanley should go in to assist any proposition of that kind. It was that matter Mr. Hanley wanted to talk to me about at the Island ranch. That is the matter we did talk about. I will say the feeling against Mr. Hanley in regard to this order is an entirely separate thing.

Q. But you are familiar with Mr. Nichol's letter to Mr. Corbett? A. Yes.

Q. Well, then, there is a feeling of hostility that Mr. Hanley is taking a part in making you trouble in your title?

A. The feeling of hostility to Mr. Hanley has been from the very first time that he violated this decree,

(Testimony of Edward F. Treadwell.)

which he violated, and has been held to have violated a few years after it was entered. Our hostility to him has been continued and consistent, from that time, and he has violated it, in our opinion, every year since that time. We have had numerous proceedings against him, without any results. So, as far as the feeling is concerned, it is there irrespective of the suit.

COURT.—I think you are getting outside of the regular inquiry here.

A. When this proceeding was commenced, Mr. Hanley again went in the newspaper and said that all of this thing was simply all right; that there was no occasion for any of this [91] proceeding at all; that it was simply a hostile proceeding to injure people,—took the full responsibility for it, by a public statement in the Journal. I have that.

[Interview of William D. Hanley in "Oregon Journal" of April 30, 1915.]

COURT.—Was that after this proceeding was brought

A. After this proceeding was commenced. I would like to have that in evidence. It is headed "Citation is termed attempt to drive out home owners." It is an interview of Mr. Hanley in the Journal of April 30, 1915.

COURT.—You may read that.

A. "Federal Court action instituted by rich Californians denounced by Wm. Hanley. Water Right Is At Issue. Pacific Coast Livestock Co. accused of harassing the settlers in Harney

(Testimony of Edward F. Treadwell.)

County. William Hanley of Burns, who with a score of other defendants is cited to appear in the Federal Court to show cause why they should not be fined for contempt of court, to-day declared that the citation is only 'another step' to harass settlers of Harney County by the Pacific Livestock Company of San Francisco, owner of about 100,000 acres of land in southeastern Oregon. The citation alleges that Hanley and codefendants were not to divert water from the Silvies River except under certain restrictions under a stipulated decree of 1901 and that they have continued to do so this spring. As a result, it is alleged the stream was obstructed, and the river's flow diverted onto the company's lands. 'The whole thing is simply based on the proposition that the San Francisco concern wants our country as a range, and we want it for homes,' said Hanley. 'We people want to live in our own country and develop it, while they want to keep it a cattle range for their enrichment. They have kept up a campaign of continuous harassment for years in an attempt to drive us out. They have kept the litigation in the United States Courts so the [92] ordinary man cannot defend himself on account of heavy expenses. They operate under the butcher's code—Take the best—and we stand in their way. Along the Silvies River we own probably 15,000 acres and they 50,000. Excepting myself the majority of defendants are men owning small parcels of land averaging 160 acres. They are farmers, and farmers are not wanted by this

(Testimony of Edward F. Treadwell.)

huge cattle company that wants to keep our country a range for its enrichment in California.' ". I told Mr. Hanley, when I was on his property, that every inch of his Belle-A property was range—was simply wild hay—and if he would sell that to the people, why, that would probably give us a chance to sell ours. He has never sold an acre of it. We are just as anxious to sell ours as he is.

Q. It is all for sale?

A. Yes, sir, every bit of it is for sale.

Q. Well, I say his is for sale?

A. Yes, so is ours, if we can get our price. He has never sold an acre of it. He controls more land in that vicinity than we do.

Q. Is that so, Mr. Treadwell? A. Yes.

COURT—I think we are taking a very wild range in this matter. Its only bearing is upon the animosity that appears between these two parties. We need not take up that matter further. [93]

* * * * * * * *

Q. As a matter of fact, this dam that you restored, as you say, that is, restored the river by taking out the dam, was diverting water onto section 31, wasn't it?

A. Onto 31 immediately, and then down to section 6; principally on section 6.

Q. 31 was never located, was it?

A. We will discuss that when we come to it.

Q. It never was—it is not in the decree?

A. It certainly is in the decree. Mr. Hanley is enjoined from maintaining any dam on Silvies

(Testimony of Edward F. Treadwell.)

River, except the particular ones, and this particular dam is mentioned in the decree, and all of the defendants are as much enjoined from maintaining that as any other dam except at the times permitted. And it never has been maintained before this at any time, except as permitted by that decree. That dam has been out, up to the first day of July.

Q. Of course, the decree will show for itself, but I think it might shorten matters if you would say that section 31 was not in the decree.

A. It is in the decree. Mr. Hanley himself says he owned it at the time we brought the suit. We asked that he be enjoined from maintaining any dams in the river except the particular ones.

Q. Well, we will argue that further? A. Yes.

Q. What dam did you take out besides the 31 Luig dam, when you said that "there won't be any situation"?

A. Well, my instructions were for them to take out the Luig dam, and for them to close the head of the People's ditch.

Q. Take out the Young dam?

A. No, the Young dam was a solid structure in the river [94] built in, and the Court had ordered Mr. Young to take it out, and since Mr. Young will take the stand later, I might as well dispose of that now. After the court had made its order in the Young matter—

Q. When was that made?

A. Made about two years ago. I saw Mr. Young on the streets of Burns. He came to me and talked

(Testimony of Edward F. Treadwell.)

about that matter, and I says: "We hold you, Mr. Young, responsible for that dam, and you must remove it. There is no use your saying Mr. Hanley"—that is what he said, that he helped Mr. Hanley construct it. Mr. Hanley has an interest in it—I says: "You put that dam in there; you used it, and you have got to take it out. And the conversation was rather warm, and that was all there was to it. It never has been taken out, so I didn't interfere with that because it was a permanent structure, and you cannot remove the boards without tearing the dam out itself.

Q. This gentleman wants to know if it is not a dam constructed on the general principle common up in that country, with removable boards?

A. Removable boards, except the bottom portion. It has got something like a foot, or possibly a little less than a foot of permanent boards across it.

Q. Did you see any boards in the dam, any water being diverted out?

A. Sure, the water was being diverted out.

Q. Were there permanent boards in the dam?

A. These permanent boards were in the dam.

Q. That is part of the dam structure?

A. Surely.

Q. It is removable?

A. It is not removable; I mean in the ordinary manner, without removing the nails. [95]

COURT.—That raises the water about a foot?

A. A foot or more than a foot; the actual raise of the water. And the water could not possibly have gone into that ditch without that dam. No water

would have gone in. It is at least a foot higher than the water in the river. [96]

* * * * *

**[Testimony of John Gilcrest—Direct Examination
(Portions of).]**

JOHN GILCREST, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows.

Direct Examination.

(Questions by Mr. TREADWELL.

I believe the record shows, Mr Gilchrist, that you are the superintendent of the Pacific Livestock Company? A. I am.

Q. There has been reference here made to the water in Silvies Valley. Has the company diverted any water whatever in Silvies Valley this year?

A. We have not, from the river.

Q. You know the ditches that have been constructed up there? A. I do.

Q. What is the object of those, Mr. Gilchrist? What is the object of those ditches?

A. My understanding of the object of those ditches is, when at extreme high water, to irrigate the land.

Q. Has there been anything of that kind this year?

A. There has been no high water.

Q. What instructions, therefore, did you give in regard to those ditches?

A. I instructed our foreman there, to keep all heads of the ditches tight closed, and divert no water from the river.

(Testimony of John Gilcrest.)

COURT.—Does the company own land on the upper river?

A. Yes, a large quantity of land is Silvies Valley. Owned it for very many years—30 years ago. [97]

* * * * *

Q. Now, did you also see it after all of the boards had been put in, as testified to by Mr. Griffing, on the 4th day of May?

A. I saw it on the afternoon of the 4th day of May.

Q. That was after Mr. Griffing had seen it.

A. After Mr. Griffing had been there.

Q. Was it still in the same condition, or any change made? A. It was not.

Q. What change had been made?

A. The boards were not all in.

Q. How many boards were in then?

A. There was a drop of water over the boards that were then in, I should say, of about 2½ or 3 feet. I could not see how many boards were in, because the water prevented it. The other boards that had been taken out, evidently taken out, were lying on the two ends of the structure, and just on the banks, and they were still wet, like they had just been taken out a very short time before I went in there. But they were not all in when I saw it.

Q. You also saw the Young ditch, the Sunday of the 25th of April, did you not? A. I did.

Q. And you saw the water being diverted to the west by that ditch did you? A. Yes, sir.

Q. Was Mr. Young there at that time?

A. He was. I talked with him.

(Testimony of John Gilcrest.)

Q. Did you also see the two new dams, down by the Voegtly place? [103] A. One new dam.

Q. One new dam? A. Yes.

Q. Did you also see the old skeleton of the dam?

A. I did.

Q. Now, that old skeleton of a dam, Mr. Gilchrist, since the entry of this decree, has that dam ever been used, or the boards put in, or any material put in there, before the first day of July? I don't mean before the 1st day of July. I mean—well, been put in there at all? Has it been used at all to your knowledge?

A. I never recollect of seeing any boards in that dam, or it being used for irrigating purposes at all. I saw the first boards in, and the dam thoroughly stocked up with hay, stock bottom, manure, and so on, pretty early last fall; but I never had known personally of that dam's being used since the date of that decree, for irrigating purposes.

Q. Did you give any order as to what should be done with it at that time, or did you do anything to it?

A. I don't think I did last fall, unless I told Mr. Newman, our foreman, to open a water way through that. I think I did tell Mr. Newman. I am not positive as to that. We were suffering for water at the Island ranch at that time. We had no stock water. [104]

* * * * * * *

[Testimony of John Gilcrest—Cross-examination
(Portions of).]

Q. When you were out at the Young dam and saw Mr. Young, was it George Young, the father—Senior? A. It was.

Q. Did he tell you at that time that he did not claim any interest in that dam, that it was Hanley's? A. He did.

Q. Is that the first time that he has ever said that?

A. To me, that he had ever disclaimed any ownership in it, [112] I think that is the first time that he ever positively stated that he did have no interest in it. [113]

* * * * *

Q. I think you said that 34 was a tule marsh, and you hadn't cut any hay. Hadn't that 34 been largely reclaimed by the operation of the Hanley drain ditch, and hadn't you cut hay there after the Hanley drain ditch was inaugurated?

A. We have cut hay there for a good many years; some hay, but more and more as the section has been reclaimed, and the nature of the vegetation changed with cutting; but the Hanley drain ditch I do not think has materially improved it. I don't know that it has improved it at all. I do not think that it has.

Q. You don't think it has. Well, the purpose of the Hanley drain ditch is to act as a safety valve, and relieve the water [118] when it is gorged?

A. It never was, and it was stated plainly that it was to drain surface water from their own land. It

(Testimony of John Gilcrest.)

was not to drain water from lands below the head of that ditch, certainly.

Q. No, no, I don't mean that, but I mean to say when the river was full, and could not carry any more, and when this surface water would come down and would turn Hanley's land into swamp wasn't the purpose of this drain ditch to relieve that excess? In other words,—we will put it in another way—there is no real necessity for that drain ditch when the river is not flooded, is there?

A. There is no necessity for it all.

Q. What do you mean by that—that there is no necessity to drain?

A. It has been used more taking water out of the river and carrying it away from the river than it has been used for drainage.

Q. Well, when it carries the water away from the river, where does it dump it?

A. Dumps it into the Embree Slough.

Q. Dumps it right on your land to your benefit, doesn't it?

A. The same water coming down its natural channel would benefit us infinitely more. We would get it on lands that we want to put it on.

COURT.—Would that go down into the main channel again after it was taken out by the drain ditch?

A. It would go into the Embree Slough, and go down, miles down, through that slough, and return to the East Fork of the river again, miles below, and

(Testimony of John Gilcrest.)

below all of our lands adjoining 34, in 2 and 10.
[119]

COURT.—Would it go down so that the river would not take it up, and then out in your sloughs that you described this morning, and on to your land farther down?

A. Eventually it would reach those sloughs through a different channel entirely, after it had been clear out across another territory entirely.

Q. As a matter of fact, your Boat Ford dam that you spoke of really diverts and regulates this very water, doesn't it?

A. All of the water that was getting down there at the last time I was at the Island ranch was coming that way, and not down the river channel—not down its natural course.

Q. What effect has your taking out this water through the Orphan ditch had on your main lands in 3 and 4? Has it improved them?

A. It is the only available water for them.

Q. Well, I say has it improved them?

A. Yes, sir.

Q. I understood you to say, though, that there was not enough to fully reclaim them.

A. You cannot cover all of them with water from that source.

COURT.—When you speak of 3 and 4, what township is that?

A. 24-31, right west of this section 34, this swampy section 34, west and south. [120]

* * * * *

**[Testimony of Ben Newman—Direct Examination
(Portions of).]**

Q. You went to the Luig dam this year, did you?
At the time it has been testified? A. Yes, sir.

Q. Will you tell the Court where the water went to
that went out of the river at that point?

A. Well, it went out across section 6, and across
into the northwest corner of section 8.

Q. You know Mr. Luig's land, do you?

A. Yes, sir. This northwest quarter belongs to
Kelley. There is a slough that goes across here, that
emptied some water into that, goes down into the
south of 8, from there off into the southeast of 8.

Q. Did you go down and drive through the Luig
land? A. Yes.

Q. How far down did you see water through his
land at that time? A. Clear across his land.

Q. How near to his house?

A. Oh, possibly 300 or 400 feet.

Q. Did you subsequently pull the boards out of
that dam? A. The Luig dam? [124]

Q. Yes. A. Yes, sir.

Q. Do you remember when you did that?

A. The 26th. [125]

* * * * *

**[Testimony of Ben Newman—Cross-examination
(Portions of).]**

Q. Where did the water go that went out by means
of what you call the Luig dam?

A. It went out across the southwest quarter of 31,
and across into 6, into the northwest quarter of sec-
tion 8.

(Testimony of Ben Newman.)

Q. Who owns the northwest quarter of 8?

A. I think the Kelley heirs. I don't know just what ones.

Q. Then where does it flow to? It doesn't stop there?

A. No, it goes into the slough there and goes down through the southeast quarter of section 8, and across the road into section 9.

Q. Goes by regular channel? A. Yes, sir.

Q. Who owns section 9?

A. I don't know whether Mr. Hanley does, or some colonization people. It was road land at one time, at least.

Q. Does any of this water go by this course on to company land? A. Yes, sir.

Q. Where?

A. It goes from there on down into what is called the Frye field.

COURT.—That is in section 16?

A. No, sir, I don't believe it is. That is a school section. It goes off down into section 10.

COURT.—Section 10, east of 9?

A. Yes. [133]

Q. Then the water that went out from the Young dam, I think you said went across Hudspeth place?

A. No, sir, I didn't say it.

Q. Then I am mistaken. Where does that go?

A. It goes out across Mr. Hotchkiss' land and on the Thornburg land.

Q. Hotchkiss? A. Yes.

Q. I thought you said Hudspeth? A. No.

(Testimony of Ben Newman.)

Q. Go ahead and describe it; describe its flow, where it goes?

A. It goes right across the Hotchkiss place, and across the old Voegtly place. A little bit of it gets into that section of road land, I believe, that lays west of the Thornburg place.

Q. Where does it go from the Voegtly place?

A. Goes into that road land, part of it.

Q. It stops there, does it? A. No.

Q. Where does it go?

A. It goes further on to the south.

COURT.—That all goes to the west?

A. Southwest, yes.

COURT.—Any of it flow to the east?

A. Not from the Hotchkiss.

COURT.—I mean from the Young dam.

A. No, sir, it don't go to the east. It goes to the west.

Q. Well, does any of that get on to company land, and if so, how?

A. It does, after it gets high enough to get on to that company land, there in 32, I guess it is.

Q. What do you mean by high enough?

A. When the water gets far enough down there to reach it.

Q. Do you mean in elevation—when the water rises high enough in the river? [134]

A. When it gets on its level, so as to get over that little bank that is there.

Q. I don't believe that I am familiar enough with the country to understand what you mean. Do you

(Testimony of Ben Newman.)

mean when it gets high enough, the water level in the river, or when, after having been diverted by the dam, the water reaches a high enough level to run on to the land?

A. After it has been diverted, and gets out there, and gets high enough to reach that section, why, then, of course it covers a small portion of that.

Q. The company owns section 36, in that township and range, doesn't it? A. 36?

Q. School section.

Mr. TREADWELL.—He means this one out here, I suppose.

A. 36. That is 35.

Mr. TREADWELL.—Which one do you mean—the one out there west of 31?

Mr. WOOD.—Yes, west of 31.

Mr. TREADWELL.—That is in the other township over here? The one that is irrigated from the Warm Spring, I suppose. Is that the one you mean?

A. Yes.

Mr. WOOD.—Yes, I do.

Mr. TREADWELL.—You want to give us the water everywhere except where we want it.

Q. Township 33, Range 30. Well, I wanted to get the ownership of that fixed, if you know. If you don't know, all right. Your duties do not extend beyond the Island ranch, then?

A. Yes, sir, it extends on all the company property that lays in Harney Valley. [135]

Q. Then you would know whether you are irrigating section 36?

(Testimony of Ben Newman.)

A. I have said this water would go across 36, if there was enough to reach that far, if it was turned out.

Q. The company owns 36?

A. Yes, I think if that is what you mean, that adjoins 31.

Q. Down the west side of 36 you have a ditch, haven't you?

A. Yes, sir. That is on the east side of 36.

Q. Yes, on the east side. That catches the water, doesn't it? A. Yes, sir.

Q. Where does that ditch deliver the water in the river? Can you describe it by section line, near what point?

A. We start about this corner of 31 there, the southwest corner of 31, near the corner.

Mr. WOOD.—You didn't examine him on those dead cattle, did you?

Mr. TREADWELL.—No.

Q. Do you remember anything about the conditions of the weather as to cold and freezing, through the month of March up there?

A. Why, it was not freezing so very hard through the month of March, no. It had froze in February.

Q. Wasn't it an unusually severe winter??

A. Well, I don't think so.

Q. About an average?

A. About an average. Possibly there was a few days, maybe ten days, was a little colder than an average.

Q. What ten days would those be?

(Testimony of Ben Newman.)

A. Well, I couldn't say. I didn't keep any dates of it.

Q. But you think the month of March was not particularly cold? A. No, sir, it was not. [136]

* * * * *

[Testimony of Ben Newman—Redirect Examination (Portions of).]

Q. This school section that has been referred to as the Warm Springs school section? A. Yes, sir.

Q. What is the principal method of irrigating that section?

A. Well, we could irrigate part of it from the Warm Springs, and part of it from this ditch that runs along the east side of 36. We put some little dams in there to spread the water.

Q. Which water?

A. The water that comes down from the Warm Springs, and also some of the water, probably, that comes across in this Hotchkiss and Thornburg ditch.

Q. The principal way you have of irrigating it is from the springs? A. Yes.

Q. That is the principal way? A. Yes, sir.

[Testimony of Ben Newman—Recross-examination Portions of).]

Recross Examination.

Q. Has it been fixed here, the date when Hanley is supposed to have closed the drain ditch, and you got sufficient water for stock purposes? Can you give the date, approximately? A. The date?

Q. Approximately the date when you got relief

(Testimony of Ben Newman.)

on the stock water proposition.

A. I think it was the 7th or 8th.

Q. Of April? A. Yes, sir.

Witness excused. [137]

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**[Testimony of William D. Hanley—Direct
Examination (Portions of).]**

Q. Well, where was this land situated that you leased in 29—on the west or the east side?

A. It was the west half of 29, that would get water—west half of 29 would get water from this Young dam, leased to a man by the name of Dickinson.

Q. Well, now, I say, would that go out on the east or the west side of the river?

A. On the east side of the river.

Q. So that when you say water had been going out on the west side, that would not benefit you at all.

A. Not at all, no. I don't want to quite say that the water had [146] been going out on the west side. There was water out on the west side. There was no water going out on the west side when I was there.

Q. But there had been some out?

A. There was water out on the west side. There had been water out there.

Q. Water standing there?

A. Yes, water standing there.

Q. The marks of where the water went?

A. Yes, the water was standing on the road, and there were marks of water. The water was out on the west side. There was water out on the west

(Testimony of William D. Hanley.)

side. It might have come out from some other place.

Q. But that has all nothing to do with your section 29?

A. No. No, nothing to do with it.

Q. Now, I think you have already said, but did you have any conversation, or give any encouragement to Young and Hotchkiss, or Thornburg, to make use of this dam, or divert any water this year?

A. No, sir; no, sir.

Q. Now, this dam that is called the Young dam, as I understand, is a new dam different from the one that was in existence at the time of the decree. Is that so? A. Yes, sir.

Q. What is the difference?

A. Well, the difference is in the location. The dam that he had at the time of the decree was below it on his own land, and this dam was built afterwards, and built above. These dams generally have to be built, or reconstructed as often as once in every 10 to 15 years, at the outside.

COURT.—Who reconstructed the Young dam?
[147]

A. Why, Mr. Young reconstructed it. I think probably that I was some party to it myself. That is, that I put in, but I am not just prepared to testify. Those little minor matters slip away from me. But since I have had section 29, I have got water out of it every year to irrigate it since the decree.

Q. I think that that is one of the points on which Mr. Gilchrist and perhaps Mr. Newman, said that

(Testimony of William D. Hanley.)

the water had not been taken out, except this year. Now, you say that you have taken water out by means of this dam every year? A. Yes.

Q. For how long?

A. Why, to some degree, ever since I have had section 29.

Q. How long has that been?

A. It is 12 years, I guess.

COURT.—I understand in this proceeding, there is no complaint that water has been taken out on the east side. It is wholly on the west side of the Young dam, if I get the connection of the story.

Mr. WOOD.—Yes, that is my understanding of it. But I want to show it in relation to the charge of conspiracy, in aiding and abetting—to show lack of motive, I mean.

Q. Now, about the structure of the new dam as compared to the old dam, does the new dam raise the river any higher? A. No, sir.

Q. Do you remember anything about this permanent board that is nailed across the bottom of the new dam?

A. Well, I wouldn't go into detail as to just what it has across it. I would say that this dam is probably a foot above. There is a drop. It is above the bottom of the river. There is a drop. The water drops after it passes through it. [148]

COURT.—Does that divert the water?

A. No, no.

COURT.—Suppose the river is high, will it divert it then?

(Testimony of William D. Hanley.)

A. No, I don't think so. This river, I think, to the mind of the Court, and the people generally, the word "river" is a great deception. It is this water coming out of the mountain, and we call it the river, because it tries to hold onto its water, and in trying to hold on to its water, it builds up its banks above the level of the country around.

COURT.—I have seen it—not in there but other places.

A. And the difference between a slough and what they call the river channel, is that the slough is reaching out to grab water all the time. It has its fingers out to catch it, and it gets into it, so that this channel going down through until it gets into 35 on one side, and then into what is known as the Potter Swamp on the other, holds up clear above the level of the ground, I think probably up to $2\frac{1}{2}$ feet—3 feet, maybe.

Q. Now, do you know whether the water in this new dam—do you know by observation, of your own knowledge, that the water by this new dam is backed up to a higher level than it was by the old dam?

A. Well, the old dam was practically the same structure. It was above the level of the river. It was above the level.

COURT.—The bed of the river?

A. The bed of the river. The fact of it is, all of those early dams were built above. It was a great undertaking to build any structure to hold, and all of them were built above. They could put a solid structure underneath easiest when they built them

(Testimony of William D. Hanley.)

all above the level of the river.

Q. Now, by the third article of this Information, you are charged with aiding and abetting Carey Thornburg and Hull Hotchkiss in the use of a dam in the northeast quarter of Section 30 [149] situated near the south—let me get this straight—the statement is that originally near the south line of section 30, there was the old Voegtly dam, and that had been abandoned and that Hotchkiss and Thornburg were permitted to use this Young dam in lieu of the old dam, and its skeleton was left in the river, and that that skeleton had not been used—it had been abandoned—but in 1914, and again in 1915, that Thornburg and Hotchkiss, blocked by means of the old skeleton the flow of the river. Now, as I understand it, there is no charge against you individually there for the use of that or the benefit of it, but only that you aided and abetted, and encouraged them in it. What is the truth of that?

A. Well, I ran for office last year, and I was not at home. When I did go home last fall, they were just finishing work on it, the first time I went to 31. And that dam has never been abandoned. There has been boards in that dam, and that dam has been operated, I would say, every year. I don't know of a year when it was not operated.

Q. Is this the old Voegtly dam?

A. Well, I don't know just what the name of the dam is. We know it as the Thornburg dam.

Q. Near what section line is it located?

(Testimony of William D. Hanley.)

A. Well, it is just north of 31.

Q. That would be near the south line of 30?

A. South line of 30.

Q. Well, now, did you do anything to encourage these men in the use of that old skeleton—whether they had a right to it or not—whether they put the boards in or not,—the question is, did you instigate it, or encourage it, or have anything to do with it?
[150]

A. Oh, I never had anything to do with it. I had no knowledge of it being rebuilt until last fall, when I went to 31, I would say, in November.

Q. How about this year? Did you encourage the use of it?

A. I did go up to it the other day, but there isn't any water in it. It is not being used at the present time.

Q. I know, but that is not just exactly the point. You say it isn't being used, but the point charged against you in this instance is, that you encouraged them to go and use that and violate the decree. Have you ever done it?

A. No, sir. As I say, the dam has been used every year since I have been operating 31.

Q. Well, not for your benefit?

A. No, but it has been an operated dam.

Q. By whom?

A. By Carey Thornburg and Mr. Hotchkiss.

COURT.—Was it before May 12th?

A. Well, I wouldn't get technical on dates. The fact of it is, I don't know much about the inside de-

(Testimony of William D. Hanley.)

tail of keeping records on those things. I am off on these outside ranches so much of my time that in these periods outside of the 21 dam—outside of the 21 dam, I would say that, in a general way, I do not really know technically.

COURT.—I understand—

A. But when I would speak about, through the season sometime I am over there.

COURT.—I understand the parties have a right to use these dams, most of them, after May 5th or 12th, or along there. Of course, it becomes necessary then to determine when they were used.

Mr. WOOD.—Yes. [151]

A. Well, I wouldn't like to be a witness on to the details of when those boards were put into these dams in the different places.

Q. It wouldn't do you any good, would it?

A. I wouldn't want to say that it didn't. There is a corner of 31 that gets water off it.

Q. Are you talking now about the old skeleton—the old one?

A. Well, I am talking about—I never knew it as a skeleton. It has always been a live man.

Q. Well, apparently, by this information, there are two. The old skeleton, as they call it, near the south line of 30, and then this new one that was put in later on.

A. Well, the dam that was built last fall, was built, generally,—general knowledge—was built in the same place that the old one was built. It might have been a little bit above, or a little bit below, but

(Testimony of William D. Hanley.)

it is built in the same place.

Q. Well, as I said, you know that dam, as far as you are concerned, is not in the information. The information against you is encouraging these men to go and do it.

A. I did not encourage them.

Q. I understand you did not do that. A. No.

Q. By article 4 of the information, you are charged with aiding and assisting P. G. Smith and Carey Thornburg to violate the decree by constructing a new wooden and rock dam in the west fork of Silvies River, immediately above the Voegtly dam, extending clear across the river; and again, it didn't charge, as I understand, that you would get any benefit out of that, but only that you aided and encouraged them to violate the decree. Is that true?

A. No, I did not. As far as my knowledge goes, they are getting [152] one more dam in there than I know anything about.

Mr. TREADWELL.—What are you talking about—the new Voegtly dam?

Mr. WOOD.—Yes.

Mr. TREADWELL.—You just said it was built last fall. You said you were there and saw it.

Mr. WOOD.—This is the wood and rock dam.

Q. That is the one you meant was built last fall?

A. Why, I wasn't closer to it than just riding up to the fence in 31, south of it, and calling Mr. Thornburg over to the fence, and talking to him about feeding cattle last fall,—when we were going to put cattle on feed. He feeds out the hay on 31. And

(Testimony of William D. Hanley.)

that was the first that I knew about it, and as far as the detail, I have never been to it.

Q. Well, did you encourage them to use it or build it? A. No, sir; no, sir.

Q. Over there on the west fork—is it any benefit to you?

A. Well, I would say it is friendly to me. It does irrigate some of 31—that is, the water spreads from it. [153]

* * * * * * *

Q. Well, it isn't there, but I will state it from memory in this same connection, there has been a supplemental, or additional information filed against you for contempt in having the boards in the 21 dam on the 4th of May, instead of the 5th of May. Do you personally know anything about that?

A. I got back to the ranch the evening of the 3d of May, and in the morning I went over to the office, which is facing west from the house, my living house, probably a distance of 200 feet; and I went to the office and worked over routine matters of the office, with my secretary, and accountant of the company, Mr. Sterling, till noon, and had my car ordered to go to the P ranch in the afternoon, and I went over to my own house, and Mrs. Hanley had a little lunch set for me; and when I came back to get my car, I seen the gulls—the gulls over in 21—and, then, of course, with a little observation, I seen the water. That was on May 4th. I seen the water running down in this ditch. The gulls is always [168] a mark of water being turned on new

(Testimony of William D. Hanley.)

ground. And I immediately went into the office and said to Mr. Sterling: "This is only the 4th—why is that water out on 21?" Well, he said he didn't know. Well, I said, "That water must be stopped and stopped right away, because our neighbors are feeling so much contempt about it, that I don't want a little day's gnat of water," and Mr. Sterling—I got into my car, and he immediately went to attend to it, and he will testify later what he did. Mr. McLaren, too, is here, as a witness on that. [169]

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[Testimony of William D. Hanley—Cross-examination (Portions of).]

Q. Now, in regard to this People's Ditch that was said to be open and carrying water, that goes right down onto your section 5, does it not? A. Yes.

Q. And that is where the water was going, was it not?

A. If there were water in that ditch, it were going there.

Q. And you knew it was going there?

A. Oh, no, I didn't know, Mr. Treadwell, and I told you that I didn't.

Q. I didn't know that you told me you didn't.

A. Yes, I did. I told you that the next day I would go over those things with you, and that I didn't know anything about those other neighbors up there, but I was responsible for the boards being in the 31 dam.

Q. Who has got charge of your section 5, Mr. Hanley? A. Mr. Ryan.

(Testimony of William D. Hanley.)

Q. Mr. Ryan? A. Mr. Ryan, yes.

Q. When were you down that side of the country before this proceeding was commenced?

A. I don't know, but I don't think I had been on 31 before, since we were taking—

Q. Section 5 I am talking about.

A. Oh, nothing more than going by.

Q. But you did go by it?

A. That is, on the road.

Q. And you cannot go by on the road without knowing that the water [196] is on it, can you?

A. Well, it hasn't had much water on it.

Q. It has had water on it, and it was visible, too, wasn't it? A. Yes.

Q. Don't you cross the so-called People's Ditch, to get down there where you went? A. No, no.

Q. Did you cross it? A. No.

Q. Did you see water in it?

A. I crossed the People's Ditch the day after you was there, that I told you that I would go and look.

Q. Yes, but I am talking about before that time.

A. No.

Q. Do you claim a right to irrigate section 5 from the People's Ditch?

A. I claim a right to irrigate it, Mr. Treadwell. I claim a right to irrigate it.

Q. You claim the right to use the People's Ditch to irrigate it, do you?

A. It always has been irrigated.

Q. Did you tell your formeman that he could use the People's Ditch for that purpose?

(Testimony of William D. Hanley.)

A. Certainly, I told him to irrigate it.

Q. Just to go to it and irrigate it?

A. Yes, to irrigate it.

Q. How long have you owned section 5, Mr. Hanley?

A. Why, I would say I have had a contract on section 5, oh, probably eight or nine years; but I would refer back to the record of the contract.

Mr. TREADWELL.—I guess your Honor wants to take recess now.

The COURT.—Yes.

Mr. TREADWELL.—I would like to ask that Mr. Hanley produce [197] the letters that I have written him,—I think I have written them all through Judge Webster,—in which we offered to cut that channel through there which he has been talking about. You will find my letters, where I have received no reply from it whatever.

A. There is no reason to answer. We can just go at it and do it.

Q. Just get those letters.

Mr. WOOD.—You say they were written to Judge Webster?

Mr. TREADWELL.—Yes, I sent a copy to Judge Webster of any letter I have written.

Mr. WOOD.—I don't know that Judge Webster will be in town to-morrow.

Adjourned until 10 A. M.

Portland, Oregon, May 11, 1915, 10 A. M.

WILLIAM D. HANLEY resumes the stand.

Cross-examination (Continued).

(Questions by Mr. TREADWELL.)

Mr. Hanley, you stated that you got section 5 about eight years ago. Did you at the same time, or since, enter into any contract with the owners of the People's Ditch allowing you to use it? A. No, sir.

Q. Have you got any such contract? A. No, sir.

Q. Did you ever have any such contract?

A. No, sir.

Q. Did Colonel Wood have any such contract?

A. I think that probably there was some kind of an agreement under the right of way, but I am not prepared to make a witness on that. [198]

Q. Do you claim any interest?

A. But I am not going to say that there was any contract, but there has been some common knowledge that there is something.

* * * * *

Q. Now, do you claim an interest in the People's Ditch? A. None at all.

Q. Didn't you testify in this court, Mr. Hanley, that there was such a contract, and that you had such a contract with those people?

A. Well, if I did, Mr. Treadwell, I would rather leave it to the record than attempt to testify.

Q. You would rather leave it to the record?

A. Yes.

Q. Do you know where the contract is now?

A. No, sir. [199]

Q. If there is one, you don't know where it is?

(Testimony of William D. Hanley.)

A. No, sir.

Q. You haven't got it—is that right?

A. Well, I may have it, but then I am of the opinion I haven't got it.

Mr. WOOD.—We can produce the duplicate of it. I don't know where the original is.

Mr. TREADWELL.—That is what I would like to have, if you please.

Mr. WOOD.—I don't know where that identical contract is, but we can produce a printed duplicate.

Mr. TREADWELL.—I wish you would do that.

Q. So the best of your information then is, that there is a contract that you have had, with the people who owned that ditch? In connection with this section 5?

A. There never has been no question about the irrigation of section 5. The water comes from the north, south, from all of the openings in the river. The main bulk of it probably comes from the 31 dam. It has been a hay section. It has been cut—it has been cut for hay probably for 30 years. [200]

* * * * *

Q. If you use it on the 4th of May, it has just the same effect as if you did it on the 5th of May, hasn't it? A. Exactly so, yes.

Q. Who put those boards in the dam on the 4th of May this year? A. Mr. McLaren.

Q. He is your superintendent, is he?

A. No, sir.

Q. What is he—foreman, I mean, on the ranch?

A. Well, he is kind of part of my business.

(Testimony of William D. Hanley.)

Q. Well, what relation has he got to your property, Mr. Hanley, and yourself?

A. Well, Mr. McLaren has been with me about 35 years.

Q. Well, he works for you, doesn't he?

A. Well, no, not specially so, only when I send for him to work for me. He has land and ranches of his own. He has boys that have land that we have let them have.

Q. He was working for you at this time, wasn't he?

A. Yes. [210]

* * * * *

[Telegram from Delger Trowbridge to Edward F. Treadwell of May 12, 1915, Containing Portion of Letter from Edward F. Treadwell to Mr. Lionel S. Webster, Dated October 26, 1912.]

“San Francisco, Calif., May 12, 1915.

Mr. Edward F. Treadwell:

Care Clerk U. S. District Court, Portland, Ore.

Part letter October twenty-sixth, nineteen twelve, to Webster, as follows: ‘We would therefore be willing to arrange that a ditch might be connected with the twenty-one ditch, bringing water down to section thirty-four and as this would be made necessary by reason of the changed channel it would only be proper that we should stand half of the cost of this ditch, as well as the new channel. The water could readily be flumed over or siphoned under the drain ditch. If this arrangement meets with the approval of Mr. Hanley, the work could be done and the plans prepared by an engineer agreed upon by the parties,

‘(Testimony of William D. Hanley.)

or we could each appoint an engineer and have them work out the plans together.’ Delger Trowbridge.”

[214]

Q. Now, do you claim any interest in either the new or the old Voegtly dam?

A. No, sir.

Q. It is on your property, is it not?

A. No, sir. What dam are you speaking of now? The Thornburg dam?

Mr. TREADWELL.—I am wrong about that. I will withdraw that. It is my error. Yes, the Thornburg dam.

Q. What was Mr. Thornburg’s relation to your company, Mr. Hanley?

A. Mr. Thornburg cuts the hay on 31, and feeds it out.

Q. That dam will turn the water out right above your section 31, will it not? A. Yes.

Q. And any water that is turned out by that dam will flow on to your section 31, will it not? A. Yes.

Q. And do you say that you didn’t contribute any part of the expense of constructing that?

A. No, sir, I didn’t.

Q. Was Mr. Thornburg working for you when he constructed it? A. No, sir.

Q. Well, he was in your employ at that time, was he not? A. No, sir.

Q. He was not?

A. Mr. Thornburg is paid a ton price for the work that he does.

Q. When I say “in your employ,” I mean you had

(Testimony of William D. Hanley.)

an arrangement with him by which he ran your property on shares? A. No, sir.

Q. Well, was he handling your property at that time in any way?

A. He were handling the crops on 31, at a price per ton.

Q. So that he was working for you in that way, and being paid so much per ton for the hay? [215]

A. Yes.

Q. So when you say he was not working for you, you are not quite accurate, are you?

A. Well, I don't mean it under the terms of a man that is given specific orders for all of his time.

Mr. TREADWELL.—Do I understand, Mr. Wood, that you have the contract with the People's Ditch Company that has been asked about?

Mr. WOOD.—There never was any such contract, to my knowledge.

Mr. TREADWELL.—So when you said there was, you were referring to something else.

Mr. WOOD.—I told you I would bring the contract with Charles Altschul for selling that land, which has a printed clause in all contracts, reserving to himself any water rights for other lands. But for the People's Ditch, as far as I am concerned, I would say I never heard of it.

Q. Well, then, under those circumstances, I will just call your attention, Mr. Hanley, to the following testimony, which you gave in this case: "Q. Have you any interest in the ditch known as the People's Ditch? A. I only have an interest in it, in the use

(Testimony of William D. Hanley.)

of the water. Q. In what way have you interest in the use of the water? A. Interest in the use of the water through the right of way of the ditch? Q. Was that ditch dug through there before you had any interest in 31? A. Before I had any interest in 31. Q. Was there any agreement between the owners of 31 and the people that dug that ditch? A. Yes, sir. Q. In writing? A. Yes, sir. Q. Have you got that, Mr. Hanley? A. No, I have not. Q. Do you know where it is? A. I think so; I think Mr. Wood has it in Portland. Q. And could you state what the substance of that is, Mr. Hanley? Do you [216] remember it? A. Well, in substance the lands of 31 and 5 have the right to irrigate the lands of that ditch. Q. The lands of that ditch? A. The lands that the ditch passes through in 31 and 5. Q. That is, they have a right to use that People's Ditch for the purpose of irrigating the land in section 5, and in section 31? A. And in 31, and they have always used it. Q. Did you own section 5 at the time of the decree? A. No, sir. Q. When did you acquire that? A. I think about the same date as 31." Now, does that refresh your memory any as to there being such a contract?

Mr. WOOD.—Just a moment, Mr. Treadwell. I can throw a little light on that, in a general way. Charles Altschul never gave the right of way for an irrigating ditch without reserving as his compensation, that he and his successors should have the right to use that ditch themselves. I do not know that there is any such right of way contract here in the

(Testimony of William D. Hanley.)

case of the People's Ditch. I do not know that he ever made or gave them any deed of right of way, but if he did, then that general condition will be followed: That he and his successors are to have the right to use the ditch in common for their purposes.

Mr. TREADWELL.—We do not accept that statement.

Q. I ask you, Mr. Hanley, do you remember getting any such contract from either Dalton or the Kelley estate, or Mr. Hudspeth?

A. We have no such contract, Mr. Treadwell, and I would say that as far as all our relations is concerned, irrigating those sections as people living there, that it has always been perfectly neighborly.

[217]

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[Testimony of William D. Hanley—Redirect Examination (Portions of).]

Q. You spoke about a contract with the People's Ditch Company. Have you ever yourself entered into a written or an oral contract with those people?

A. Why, I would say no, outside of no general misunderstanding between us, that since I have operated as a leasor and owner, there has never been no question of controversy between us. I get what would be called mixed water.

Q. Well, then, what contract did you refer to in your testimony and in your answer to Mr. Treadwell's question? You said that, if there was a written contract, I had it.

A. Well, I would say that this controversy has re-

(Testimony of William D. Hanley.)

freshed my memory a little bit on that, but I am rather under the impression that it stands in the form of a letter from you, maybe, to Mr. Dalton, or some of these witnesses that are here, but I am not prepared to say anything further about it than that there is a supposition in my mind that there were some such a letter at the time they dug that ditch.

Q. At the time they applied for right of way?

A. At the time they applied for right of way.

Mr. WOOD.—Probably at the time they applied for a right of way, there is such a letter, but I don't remember it.

A. But there never has been any controversy about any operating on this section. [230]

Mr. WOOD.—Most of them never applied for a right of way, I would say that.

Mr. TREADWELL.—Most of them just went in and dug them. You didn't get patent, as I understand it, to that road land until 1893. It was a serious question as to what you would get.

Mr. WOOD.—We got fee simple to title to the road land.

Mr. TREADWELL.—1903 you got your patent, didn't you?

Mr. WOOD.—We got the title when the grant was made. To save time, I would like Judge Webster to ask any questions that he has in mind. It is easier than for him to whisper them to me.

COURT.—Very well. What do you wish to ask, Judge?

Mr. WEBSTER.—I am a little bit embarrassed—

(Testimony of William D. Hanley.)

I don't want to take up any extra time of the Court; but I don't believe it has been clearly expressed to the Court just the part that the drain ditch—

COURT.—Suppose you elaborate that in your argument.

Mr. WEBSTER.—Well, I will, only I would like to have the explanation from the evidence to your Honor, to show what part it plays in the irrigation, and why it is that Mr. Hanley objects to the Orphan headgate in connection with 27 ditch, and why he objects to the opening of the channel below. Now, he has not made that clear, and I think there is a misunderstanding in the answers he has *has* made to these questions.

Mr. TREADWELL.—He certainly elaborated it a great many times yesterday.

Mr. WEBSTER.—Yesterday I was not here. There is where I am at fault.

COURT.—I think the Court has about all the light there is on that subject. It was gone over quite thoroughly yesterday. [231]

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**[Testimony of George McLaren—Cross-examination
(Portions of).]**

Q. Now, Mr. Wood I don't believe asked you about putting the boards in the 21 dam, has he?

A. No, sir.

Q. Well, did you put the boards in the 21 dam this month? A. Yes, sir.

Q. When did you put them in?

A. I thought I put them in on the 5th of May.

(Testimony of William D. Hanley.)

Q. You thought you put them in on the 5th?

A. Yes, sir.

Q. But you didn't, did you?

A. Well, I didn't know any different until Mr. Ryan came and told me.

Q. When had you put them in?

A. Well, he said it was the 4th. I made a mistake in the day.

Q. What time of the day did you put them in?

A. About nine o'clock or a little after.

Q. In the morning? A. Yes.

Q. Now, you didn't take them out, did you?

A. No, sir.

[Testimony of George McLaren — Redirect Examination (Portions of).]

Redirect Examination.

Q. Did you put the boards back in the 21 dam, on the following day? A. Yes, sir.

Q. About what time of day did you put them back?

A. About nine o'clock.

Mr. TREADWELL.—Well, then, you took them out once.

Mr. WOOD.—No, he didn't take them out. He put them in twice.

Mr. TREADWELL.—Oh, I see. You mean he put them in.

A. I forgot, really. I was honest. I thought it was the 5th of May when I put the boards in.

(Testimony of George McLaren.)

COURT.—You made a mistake as to the date.

A. Yes, sir.

Witness excused. [247]

* * * * *

**[Testimony of John Ryan—Direct Examination
Examination (Portions of).]**

Q. Did you observe any dead cattle in the river down in section 35?

COURT.—I don't think it is necessary to take up the time [252] with those obstructions in the river made by dead cattle getting in. I don't think there is enough in that to take up the time of the Court with it. It doesn't appear that Mr. Hanley is chargeable with getting them in there, or anybody else in particular, and I don't think it is necessary to follow that any further.

Mr. WOOD.—All right, your Honor.

Q. Did you see this new bridge that was built?

A. I have crossed it, yes, sir.

Q. Is it let down into the bank of the river, or laid on the top?

A. Why, it looks like it was laid on top. I never examined it closely.

Q. Did you notice whether there was a foundation board under the stringers? A. I did not.

Q. Is it any obstruction to the flow of the river?

A. Well, I shouldn't think so, being on top, and as the river gets to the top, it goes over the banks in every direction.

Q. Now you, I believe, took out the boards from the 21 dam on May 4th? A. I did.

(Testimony of John Ryan.)

Q. Under whose orders? A. Mr. Sterling's.

Q. And about what time of day was that?

A. Well, I should judge about two o'clock.

Q. What reason have you to estimate it at that?

A. Well, I had dinner at the ranch, and I drove to Burns, and stopped a few minutes for the mail, and turned around and came right back, and I had a pretty lively team, and I don't think it would take over two hours to drive eight miles.

Q. Had your dinner at twelve o'clock?

A. Yes, sir.

Q. Now, did you take out all of the boards?

A. I did not, no, sir. [253]

Q. Why not?

A. The head of water being so great, and the foot-board being high from the bottom of the dam—

Q. From the floor of the dam?

A. From the floor of the dam after you get out a certain number of boards, there will be such excessive head of water over there that you cannot do it. If you go to catching one of them boards, it will drag you in. I took out all that I could take out, at that time until the water would run down. I think perhaps there was, oh, I should judge perhaps three boards maybe, in the bottom—perhaps raise the water, perhaps it would be an elevation of maybe 20 inches or two feet; that is, out of the river. I didn't take the boards out of the ditch that leads east from the river. That was left closed. [254]

* * * * * * * *

Q. There is one thing I want to make clear; You,

(Testimony of John Ryan.)

on the 4th of May, took out all the boards in the 21 dam that you could? A. Yes, sir.

Q. I will ask you whether what you took out lowered the river enough so that it stayed in its banks, and didn't go out?

A. Well, I was not there only just a short time, and a bank of water like that takes some time to run down, you know. [255] a few minutes. I drove over to where Mr. McLaren was sitting close, and told him what I had done, and the orders that Mr. Sterling had given me. I says: "You go, pretty soon when the water runs down, and see if you can get some more of them out." And I went home. I had five or six miles to drive, and other work to attend to, and didn't stay and watch it. [256]

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**[Testimony of John Ryan—Cross-examination
(Portions of).]**

Q. Mr. Ryan, how did you take boards out of the 21 dam?

A. I had a little iron hook there to take them with.

Q. You have a platform across the top of the dam?

A. Yes.

Q. Do you reach your hook down, put it under one of those boards, and pull it up on two affairs; it runs up and down on? A. Yes, sir.

Q. You mean to say you cannot pull those out down to the bottom?

A. I didn't think so, I couldn't.

Q. You couldn't? A. No, sir.

(Testimony of George W. Young.)

Q. You could pull out the top ones, but you couldn't pull out the bottom?

A. I got down till there was a couple of feet of water; you put anything into water like that, reaching down, a short hook reaching down to hold it, and the water will take it away from you. You cannot do it. You cannot hold and steer it, and make it [257] go where you want it.

Q. You do take them out down to the bottom, don't you, at times?

A. That is the first time I have taken any out. This spring has been my first.

Q. You are a new hand at irrigation, are you?

A. Yes, sir. [258]

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[Testimony of George W. Young — Direct Examination (Portions of).]

GEORGE W. YOUNG, a witness called on behalf of the defendants, being first duly sworn, testified as follows.

Direct Examination.

(Questions by Mr. WEBSTER.)

You live in Harney County, don't you, Mr. Young?

A. Yes, sir.

Q. And you are charged with contempt here, and I want to clear up first of all one of the things about it. You were here once before, under a charge of contempt in this court, weren't you? A. Yes, sir.

Q. I wish you would tell the Court about the payment of costs in that case, how that came about that you haven't paid it.

(Testimony of George W. Young.)

A. Why, I instructed Mr. Webster—

COURT.—I don't think that is material here. They are not trying to hold him for contempt here because he did not pay that cost.

Mr. WEBSTER.—That is what this says, that is one of the charges.

COURT.—Is that your idea?

Mr. TREADWELL.—Not at all. We simply say he has not purged himself of contempt, by paying the costs and removing the dam.

COURT.—Then confine yourself to the dam.

Mr. WEBSTER.—Very well; if you don't want to hear it, I don't want to go into it.

Q. You may tell about your dam, the dam that is called the Young dam. Was there such a dam as that in the river, at the time this decree was granted?

A. No. Oh, the old dam? [283]

Q. Yes, the first decree.

A. Yes, sir.

Mr. WEBSTER.—I will call your Honor's attention to this diagram.

Q. You made this, did you? A. Yes, sir.

Q. You made it from your personal knowledge of the things on the ground there? A. Yes, sir.

Q. I wish you would point out to the Court the old Young dam, that was there at the time the original decree was made. Where was it?

A. It is right there.

Q. That is in—

A. The northwest quarter of the northeast quarter of section 30.

(Testimony of George W. Young.)

Q. Section 30, Township 23 South, Range 31.

COURT.—The northwest quarter of the northeast quarter of section 30?

A. Yes, the northwest quarter of the northeast quarter. This is the northeast quarter of section 30. This is section 30 here.

COURT.—I see.

A. That is the northeast quarter.

COURT.—It isn't located there where it is here at all.

Mr. TREADWELL.—Yes, there isn't very much difference between them if you will turn them around the same way. (Referring to the two diagrams.)

The only practical difference there is, they have the river running close to the line. As a matter of fact, it is something like probably 300 feet away from the line.

Mr. TREADWELL.—Turn this around the same way the Judge has it. Now, they are both alike. [284]

A. That map shows almost the center of the quarter.

COURT.—I have got it fixed now.

Q. Is that dam there now, Mr. Young?

A. Well, the skeleton of it is still in the river.

Q. The old dam rotted out, did it? A. Yes.

Q. How far is that from the north line of the section? A. It is about 300 yards.

* * * * *

Q. Do you have any ditch there that leads out of the dam? A. No, sir.

(Testimony of George W. Young.)

Q. Are you using any water? A. No, sir.

Q. Have you used any this year?

A. No, sir. [285]

COURT.—Now, that is not the dam that Mr. Young is cited here for.

Mr. WEBSTER.—Yes, it is.

COURT.—The new dam?

Mr. WEBSTER.—Yes.

Q. Now, that dam is constructed just as the other dams are, with this skeleton framework against which are placed movable boards, is it?

A. Yes, sir.

Q. That we have had described in these cases, so many times?

A. They are all practically the same along there.

Q. You say that you have made no use of that dam this year at all? A. No, sir.

Q. Have you made any use of the dam since you were brought here before, on those contempt charges? A. No, sir, none whatever.

Q. And at that time it was shown there were some boards had floated down against the framework?

A. Yes.

Q. Did you take those out? A. Yes, sir.

Q. And have they been kept out as far as you know?

A. Yes, as far as I know, they have been kept out.

Q. At all events, you took those boards out that were shown to have been in there, at the time you were here before? A. Yes, sir.

Q. And then you claimed you didn't put them in,

(Testimony of George W. Young.)

or have anything [286] to do with them getting in? A. No, sir, I did not.

Q. Who else under the decree—or without asking you particularly about the decree—who else took water out of the Young dam, the old Young dam?

A. Why, Voegtly and Hotchkiss, now Thornburg.

Q. Now, that Voegtly property is what Thornburg owns now? A. Yes, sir.

Q. The water came out on which side of the river that irrigated for them? A. On the west side?

Mr. WEBSTER.—That, I may say, was by permission of the decree, if your Honor please. That is all conceded. There is no question about that, is there?

Mr. TREADWELL.—Not at all as to the old dam.

Mr. WEBSTER.—Yes, I am talking about the old dam.

Q. Where is that ditch? You haven't got the ditch here, have you? A. Which ditch?

Q. Out of the old dam?

A. The Voegtly and Hotchkiss ditch?

Q. Yes. A. Yes, that is right—

COURT.—The old dam?

A. It is above the old dam. That is the ditch right there, showing where it leaves the river north of the the road there, leading out; it leads out to the corner of Mr. Hotchkiss' place, and then runs south across the road, and along the south side of the road to the west.

Q. Now, where, with reference to the new dam, did the ditch leave the river?

(Testimony of George W. Young.)

A. Right where it does now. [287]

Q. Well, but where, with reference to the new dam, above the new dam or below the new dam?

A. Below.

Q. How far below?

A. Well, right immediately below.

Q. Now, that is where it always left the river?

A. Yes.

Q. That is where it was when the decree was rendered? A. Yes, sir.

Q. Very well. That is the ditch which carries the water to the Voegtly property and the Hotchkiss property?

A. To the Voegtly and the Hotchkiss property, both.

Q. Now, since your dam has been so out of repair as to be of no practical use, has Mr. Hotchkiss cut another ditch, connected with that one?

A. Yes.

Q. Show the Judge where that one is, if you please?

A. That is a little cut right in there. It runs from that point there right above the dam.

COURT.—Right above the dam?

A. Yes.

Q. Runs from just above the Hanley—

A. Runs from just above the dam down into the old ditch. It is probably 30 feet away.

Q. How wide is it?

A. It is about three feet, I should judge.

Q. And that connects the Hotchkiss ditch, the old

(Testimony of George W. Young.)

Hotchkiss ditch, with the new dam above there?

A. Yes.

Q. Was that there while the old dam was in operation? A. No.

Q. You are acquainted with both those dams?

A. Yes, sir. [288]

Q. The old dam and the new one? A. Yes, sir.

Q. Now, are there any boards in the new dam? I mean boards in the sense of removable boards?

A. Not a one.

Q. Is there a board in it across the stream, as a part of the structure of the dam itself? A. Yes.

Q. Tell the Judge about that, if you please.

A. Well, it is a board that forms the permanent portion of the dam. It is nailed on to the dam for the purpose of holding and retaining any soil or gravel that might be placed above, in order to keep the water from washing under, and it is part of the permanent structure.

COURT.—What is the width of that board extending above the floor of the structure?

A. It is about, I judge—I think it is 15 inches.

Q. Now, is there a floor in the dam upon which this is constructed?

A. There is no board floor at all. It is a rock floor.

Q. It is a rock floor. And is this board that you speak of, nailed above here, or below?

A. Yes, it is nailed above on the upper side. It is nailed against some timbers that the removable boards rest against. These timbers stand at an angle of about 45 degrees down the river, and this

(Testimony of George W. Young.)

board is nailed right on to the foot of those timbers, and it probably raises the water above the main structure, about eight inches, I should judge, taking in the slope of the timbers.

Q. And is that the way that dams of that character are constructed there?

A. All of them, practically all of them in the river.

Q. Is that a necessary part of the structure, to keep the dam in [289] there? A. It is.

Q. Referring now to the old dam, did that have the same sort of construction as this? A. Yes.

Q. How was the height of the old Young dam there, with reference to the height of this new dam up here?

A. Well, the height of the old dam, the permanent boards, were about 30 inches above the floor. The timbers of the old dam stood up pretty straight—at a more sharper angle—and those boards were nailed on to those timbers, and there was gravel filled in, above the old dam, right up to the top, in order to keep it from washing out. It had washed out a number of times, and Mr. Hotchkiss and I hauled gravel and put in above the boards, long before the decree was rendered.

Q. Was that the condition of the old dam at the time the decree was rendered in 1901?

A. Yes, sir.

Q. Now, is there much fall in the river there, Mr. Young? A. Very little.

Q. Now, speaking of this as you know it from your intimate knowledge and acquaintance with it,

(Testimony of George W. Young.)

if the old dam was in there, and the new one was out, and the old dam was open, would the water then, up above the new dam, and at the head of this ditch, be as high as it is, with the new dam in and open, or wouldn't it be? How would it be?

A. Yes, it would be as high, fully as high.

Q. So that, eliminating the new dam entirely now, there would be then, as much water flowing to the Hotchkiss ditch with the old dam in, and the new one out, as there is with the new one in, is that right?

[290] A. Yes, sir.

Q. I want to get that straight. Now, what is there about this water running down a public road—or whether a public road, or a private road, I don't care anything about that—this water that runs in the Hotchkiss ditch?

A. Well, that is a private road that I constructed—Mr. Smith and I constructed, to get out from our places. The soil is thrown up in the middle, and the excavations have been made on both sides from the Hotchkiss corner west, all along the Hotchkiss property. From the river to the Hotchkiss corner, the soil was taken from the north side and thrown towards the center. That formed the ditch. That road was built before the suit was begun, before any decree was rendered. It is practically in the same condition now as it was then.

Q. Mr. Young, do you know a dam known as the Voegtly dam? Let us get that pointed out, if you do.

A. Yes, sir, that is the old dam in the southeast

(Testimony of George W. Young.)

quarter of the southwest quarter, of section 30, just north of the section line.

Q. Do you know anything about whether that dam has been used, or not?

A. Been used every year.

Q. Well, every year when? Right along all the time.

A. Every year, right along since the dam was built.

Q. Well, do you know anything about the new dam that is being built in there? A. Yes.

Q. Have you seen that? A. Yes, sir.

Q. However, you haven't anything personally to do with it, have you? A. No, sir. [231]

Mr. WEBSTER.—We might as well keep that understood here.

COURT.—What time of the year was that dam used, the Voegtly dam?

A. The old Voegtly dam?

COURT.—Yes.

A. Well, it was used between the 12th of May and the 1st of July.

COURT.—That is the only time you used it?

A. That was all.

COURT.—Not prior to that time?

A. No.

Mr. ERSKINE WOOD.—I don't think he used it at all.

Mr. WEBSTER.—He didn't use it at all, your Honor.

COURT.—I didn't ask him if he was using it. I

(Testimony of George W. Young.)

asked him when it was used. I didn't ask him whether he used it or not.

Q. Do you know how wide the opening through which the river flows in the old dam was?

A. It is $23\frac{1}{2}$ feet.

Q. And where is this new dam that is being constructed with reference to the old one?

A. It is about 50 or 60 feet above the old one, I should judge.

Q. What is the nature of the river there, with reference to width? Is it as wide or wider than below or above?

A. Well, it is wider, quite a good deal wider.

Q. What about the current?

A. Well, the current is very sluggish there.

Q. Now, in the construction of the old Voegtly dam, were there boards nailed up against it, like there is in the others?

A. Yes, sir, just exactly the same.

Q. How wide is the opening in the new dam that is being constructed [292] there, do you know?

A. It is 15 feet and 8 inches, in the clear.

Q. Is the floor of the new dam as high as the floor of the old one?

A. Yes, the floor of the new dam is higher than the floor in the old dam.

Q. Yes. Well, how about the floor of the new dam and the boards on it, with reference to these boards that were in the old Voegtly dam?

A. Well, they are about the same height. There

(Testimony of George W. Young.)

wasn't very much difference. If anything the old dam would be a trifle the highest.

[Testimony of George W. Young — Cross-examination (Portions of).]

Cross-examination.

(Questions by Mr. TREADWELL.)

Mr. Young, when was it you built this new dam?

A. In 1907.

Q. In 1907? A. Yes.

Q. Was it that year that the old Voegtly and Thornburg ditch was connected up the stream with the river above the dam?

A. With the old ditch?

Q. Yes. A. No.

Q. How long afterwards?

A. I think it was about seven years.

Q. About seven years when?

A. Since that new dam was built.

COURT.—That would be right recently, then?

A. Yes.

COURT.—1914?

A. Either 1913 or 1914.

Q. Well, it was before the other contempt proceeding, at any rate, wasn't it?

A. No. No, it was afterwards. Before the contempt proceeding in my case? [293]

Q. Yes. A. No, it was afterwards.

Q. So you mean that even after that, Mr. Thornburg went in there and Mr. Hotchkiss, and dug a ditch, from the river above your dam, and brought it down, and connected it with the old ditch?

(Testimony of George W. Young.)

A. Mr. Hotchkiss dug the ditch, connecting with the old ditch, in 1913, I think, above this dam.

Q. Mr. Thornburg, too?

A. I don't know whether Thornburg had any interest in it or not. I think not.

Q. When was the stop-gate put across the old ditch? To keep the water from running back into the river from the old ditch.

A. That stop-gate has been maintained there always.

Q. So it originally was the headgate to take water in, was it? A. It was.

Q. And now it is used as a stop-gate to prevent the water from running out of the ditch back into the river.

A. No, sir, that stop-gate, the boards were taken out of there. They were used this spring.

COURT.—What do you mean by stop-gate? What is it?

A. Well, there is a headgate right in the head of the old Hotchkiss ditch, that has been put in there since the decree, and has been used for the purpose of preventing the water from getting onto Mr. Hotchkiss land a number of times in the summer; and also when the flood waters run out of the banks of the river above this section line, they drop down into Mr. Hotchkiss' ditch and that headgate is used, sometimes, to prevent a surplus.

Q. To prevent a surplus in which way? To shut it from coming out of the river?

A. Yes, from coming out of the river.

(Testimony of George W. Young.)

Q. But now, at the present time, the water is running out of the river above this dam? [294]

A. Yes.

Q. And running through this new ditch into the old ditch? Yes.

Q. And it is prevented from running back to the river, by this stop-gate, across the old ditch, isn't it?

A. Yes, a good portion of it.

Q. The water in that ditch is a couple of feet higher than the water in the river?

A. No, it is not.

Q. Well, a foot higher? A. No, sir.

Q. How much higher would you put it? Did you measure it?

A. The water in the floor of that headgate is actually lower than the water in the river.

Q. It is?

A. Yes, sir, if that dirt was cleared away from the head of that.

Q. But isn't the water in that ditch standing up against that headgate a foot deep or so?

A. About—I should judge about 12 inches.

Q. If the headgate was taken out, the water would run right back into the river?

A. Some of it, yes.

Q. Now, then, beside that—to be just with these other people—I want to know when they made this connection. Did they make it before this contempt proceeding, or afterwards, in your best judgment?

A. Afterwards.

Q. Now, then, at the time you constructed the

(Testimony of George W. Young.)

dam, or at some later time, did you also construct from above the dam a flume connecting with the river?

Mr. WEBSTER.—Objected to. He is not charged with anything of that sort here. That was all brought forward in the other case, [295] and they didn't hold him for the flume at all.

Mr. TREADWELL.—They didn't? He certainly has been held.

Mr. WEBSTER.—That has nothing to do in this case. That is not charged against this man now.

Mr. WOOD.—It is not in the information.

Mr. TREADWELL.—I am not charging him with taking any water through that flume this year, because I don't think he has taken any water through the flume this year. But I am showing he did construct new works there, and he has not removed any of them, including that flume.

COURT.—Was that flume in the preceding case?

Mr. TREADWELL.—Yes.

COURT.—It was a matter of consideration of the Court?

Mr. TREADWELL.—Yes.

COURT.—Then how is it in this case?

Mr. TREADWELL.—I will not insist on it.

Q. You also at the time you constructed this dam, had a ditch leading out on the east side, did you, to the east of your property?

A. I had a ditch running almost to the river, from the east side. It didn't connect with the river on my place at all, the new ditch.

(Testimony of George W. Young.)

Q. Didn't connect with the river at all?

A. Mine.

Q. That was a new ditch. When did you construct it?

Mr. WEBSTER.—That I object to, too. That is not in this case. No charge against this man for building any ditch there at all. Here is the charge against this man: "That by the terms of the said decree, the defendant George W. Young, and the defendants Hull Hotchkiss and C. H. Voegtly, were permitted to maintain one dam in the west fork of Silvies River, which [296] was then situated in the NE $\frac{1}{4}$ of section 30, township 233 south, range 31 east, about a quarter of a mile south of the north line of the said section 30, together with the ditches connected therewith, and were permitted to close and use the said dam from the 12th day of May, to the 1st day of July, each year, and at no other times, and were enjoined and restrained from maintaining any other dam in the said river; that notwithstanding the premises, several years ago, the said dam was washed out, and thereupon the said defendant, George W. Young, and the said Hull Hotchkiss, and the said Carey Thornburg, in violation and contempt of the terms of the said decree, constructed a new dam about a quarter of a mile upstream, from the location of the said dam, permitted by said decree, and constructed the same with a permanent board across the floor thereof, which raised the water in said stream at all times about a foot and a quarter, and have ever since maintained the said dam and

(Testimony of George W. Young.)

have also constructed a new ditch taken out of the said river above the said dam, and leading onto the lands of the said Young, Hotchkiss and Thornburg,” —that is this little ditch that we have talked about here,—“And during the month of April, 1915, the said defendants by means of the said dam and ditch, diverted water into the same for a long period of time, in excess of two cubic feet per second, and carried the same away from the said river, and to the said lands; that at the time aforesaid, the water in the said river would not naturally flow into the head of the old ditch on said property; but the bottom of the said old ditch was almost two feet above the water naturally flowing in the said river when unobstructed by said new dam, and all of the said water was diverted by reason of the said [297] new dam and in violation of the terms and provisions of the said decree, and the said water has been permitted by the said defendants to flow down a large ditch, 12 feet in width, on two sides of the county road, and there to stand, and seep into, and upon their lands, and to flow over the same. And in all the acts aforesaid, the said defendants have been acting under the advice and encouragement, and with the assistance of the said defendant William Hanley; that heretofore, this Honorable Court adjudged that the said defendant, George W. Young, had violated the terms of the said decree by constructing the dam aforesaid, but was permitted by this Honorable Court to purge himself of contempt by paying the costs of said contempt proceedings and by removing the said dam, but the

(Testimony of George W. Young.)

said defendant Young has not purged himself of said contempt, and has not paid the costs of said proceedings or removed the said dam, but in continued violation of the said decree, and in wilful contempt thereof has continued to maintain the said dam and ditches aforesaid." I may say right here, since I have read that, now, that the order does not require him to remove the dam at all. There is no order of this court requiring him to remove that dam.

COURT.—That is the new dam they are talking about?

Mr. WEBSTER.—Yes. He was required to remove the boards out of it. He went back and took them out.

Mr. TREADWELL.—We don't want to discuss that, your Honor. What I want to get at is: Each one of these witnesses here on the stand—we don't want to call them two or three times,—Mr. Hanley has testified about his connection with this; I want to find out as to the use of this ditch by Mr. Hanley, as well as by the other defendants. [298]

COURT.—Very well; go ahead with that.

Q. You did construct a new ditch along your north line? A. Yes, sir.

Q. After you built this ditch, did you connect that with the river above this dam? A. No, sir.

Q. Who connected it?

A. That was done at the instance of Mr. Hanley, I think. The man that done the work, at least, told me so, that he was paid by Hanley.

COURT.—Where is that new ditch connected?

(Testimony of George W. Young.)

A. That connects above the Hanley dam, and drops into this ditch below the head.

Q. And runs into your ditch, does it? A. Yes.

Q. You say you had nothing to do with that?

A. No, sir.

Q. Didn't you tell Mr. Gilcrest and I, that that was your ditch, and you wouldn't let Mr. Hanley or anybody else use it?

Mr. WEBSTER.—To that we object. I have no objection—I have no objection to him testifying anything about Mr. Hanley, but I do object, your Honor, to him now charging this man in this way with the construction of that ditch, or with allowing somebody to use it. There is no such charge against him here at all.

COURT.—The question asked now goes to the witness' credibility. I will permit that testimony.

Mr. WEBSTER.—Very well. As long as we understand it is not making a specific charge about that.

Q. Go ahead and answer the question.

A. What was the question?

Q. Didn't you tell Mr. Gilcrest and I when we were there on [299] your property Sunday, that that was your ditch, and that you would not let Mr. Hanley use it?

A. I told you that the ditch running south of the fence belonged to me, and that I was not permitted to let Mr. Hanley use it.

Q. Did Mr. Hanley this year, or Mr. Hanley's tenant, try to get water through there?

A. No, sir.

(Testimony of George W. Young.)

Q. They did not? A. No, sir.

Q. Now, how far is this dam from your house?

A. From my house it is about—oh, it ought to be 75 yards.

Q. You have seen this water going out into this ditch along the county road all this summer, have you? A. Yes.

COURT.—You mean this spring?

Mr. TREADWELL.—Yes. This spring.

A. This spring. [300]

* * * * * * * *

Mr. WEBSTER.—If your Honor please, he confessed that he was using the dam.

A. Yes, that I used the dam.

Q. You did use it, didn't you?

A. Well, I tried to use it.

Q. You intended to use it when you built it?

A. Well, no.

Q. You just built it for your health, I suppose? [301]

A. The dam has been of no practical benefit to me, never was, because it would compel me to use surface irrigation and my irrigation is all a sub-irrigation system.

Q. You built that ditch along your north line, and connected it with this,—along your north line for no purpose?

A. I built that ditch along the north line mostly for a drain ditch and levee, to prevent the water from running off—off section 19, from running down onto me, and destroying my grain crops. That was

(Testimony of George W. Young.)

the practical intention.

Q. You gave Mr. Hanley the privilege of using this dam. How was he going to get the water onto 29?

A. Well, I suppose he was going to construct a ditch from section 19.

Q. You let him go right there, you say, and connect up with your ditch?

A. Well, I was away at the time the connection was made.

Q. You let it stay there; you didn't touch it?

A. No, I haven't interfered with it—bothered with it.

Mr. WOOD.—Are you talking about this proceeding, or the former proceeding?

Mr. TREADWELL.—I am talking about the fact.

Mr. WOOD.—I mean is it in this proceeding?

Mr. TREADWELL.—Is what in this proceeding?

Mr. WOOD.—These questions you are asking about connecting with this ditch, and Hanley taking the water.

Mr. TREADWELL.—I am simply asking him if he permitted it to be done.

Mr. WOOD.—There isn't anything of the kind in the information.

Mr. WEBSTER.—You don't claim that as contempt charge against him, do you? [302]

Mr. TREADWELL.—The whole matter has got to be laid before the Court for the Court to see the whole situation.

COURT.—I think I understand it, about that ditch now.

(Testimony of George W. Young.)

Mr. TREADWELL.—I would like to renew that other question, your Honor now, under the present circumstances.

Q. Besides these things, you also built another flume, or a flume taking out of the river at the same time you built this ditch, did you not?

Mr. WEBSTER.—That we object to. That is not charged in this case; not a word been mentioned on the subject.

COURT.—Where is that flume?

Mr. TREADWELL.—On the west side of the river, taken out above.

COURT.—On the west side, taken out above this new dam?

Mr. TREADWELL.—Yes.

COURT.—You may ask about that.

A. The new flume was built along after this ditch was constructed. The new flume was built to connect an old ditch that I had with the dam, in order to irrigate a little garden plot that I had.

COURT.—On the west?

A. On the west side, yes.

COURT.—Is that being used now?

A. Never has been used. Never was used at all.

COURT.—I think that is enough about that.

Mr. TREADWELL.—That is all. I think that covers everything.

[Testimony of George W. Young—Redirect Examination (Portions of).]

Redirect Examination.

Q. Just one other question I would like to ask

(Testimony of George W. Young.)

to make perfectly clear what I deem to be a very important factor. Is there any more water goes out or will go out through the Hotchkiss ditch, [303] by reason of the new dam, than there would be if the old Young dam was kept as it had always been?

A. No.

Q. Then the only effect of this new dam, so far as the Hotchkiss ditches are concerned, is simply to be a substitute for the old dam which went out, or which rotted away—the old Young dam? A. Yes.

COURT.—If that is true, what is the reason that you have that headgate in there to prevent water from running from the Hotchkiss ditch back into the river? A. The headgate?

COURT.—No, below the headgate. I understood you to say a while ago that there was a headgate into the place where the old ditch came out? A. Yes.

COURT.—Before the change?

A. From the head of the ditch?

COURT.—I understood you to say that sometimes that gate was kept in there for the purpose of keeping the water from running from the ditch back into the channel of the river.

A. Sometimes, yes, it is.

COURT.—How do you reconcile that with the fact that you say now the new dam does not raise the water any higher above the new dam, than the old dam raised the water at the same point?

A. Well, the old dam has gone out and doesn't back the water up.

COURT.—I know. Supposing the old dam was

(Testimony of George W. Young.)

there. I understood you to say a while ago, that with the old dam there, it would raise the water practically the same height above the new dam that the new dam raises it now? A. Yes, it would.

[304]

COURT.—Is that a fact?

A. Yes.

Q. In that way the water would run out that old headgate?

A. The old headgate? Run into the old headgate.

Mr. WEBSTER.—Run into the old Hotchkiss ditch.

COURT.—I understand. You went over that a while ago. I didn't know why he should keep the headgate closed in that ditch for the purpose of keeping the water in the ditch from running into the channel below the new dam. I was wondering how that could be reconciled.

Mr. WEBSTER.—The old dam being out, of course lowered the water below. That is all. [305]

* * * * *

(Examination by Mr. WEBSTER.)

Q. There is one other question in another case. Do you know where the People's Ditch is?

A. Yes, sir.

Q. And do you know where their headgate is?

A. Yes, sir.

Q. Do you know anything about the condition of that headgate along in March or April, along in April when you were there, or were you there in April?

A. Yes, I was there in April.

(Testimony of George W. Young.)

Q. What was the condition of it then?

A. It was closed up.

Q. How late in April do you remember you were along there? A. I think it was on the 17th.

Q. Had you been along there before—different times?

A. Yes. Not at the headgate. I had crossed the ditch.

Q. Was there any water in the ditch you could tell?

A. Yes, there was some water in the ditch. [306]

Q. That was when—in March?

A. That was in April.

Q. In April? A. Yes.

Q. When was it you saw the headgate?

A. About the 17th, I think.

Q. That was closed then?

A. Yes, it was closed.

[**Testimony of George W. Young—Recross-examination.**]

Recross-examination.

Q. When was it you saw the water in the ditch?

A. About the 15th or 16th, along the same date. I was backwards and forwards there, two or three days. ,

Q. You don't know who opened that ditch?

A. No, I do not.

Q. Why do you shake your head in that way if you do know? A. Well, I don't know, no.

Q. You have a pretty good idea, then, I think?

(Testimony of George W. Young.)

A. As to who opened the ditch?

Q. Yes. A. No, sir.

Q. You don't know anything about it?

A. No, I don't know anything about it at all.

Witness excused. [307]

* * * * * * * *

[Testimony of Hull Hotchkiss — Direct Examination.]

HULL HOTCHKISS, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. WEBSTER.)

Q. Do you live in Harney County?

A. Yes, sir.

Q. Have lived there for a good many years?

A. Yes, sir.

Q. Your business is that of farmer and stock raiser?

A. Yes, sir.

Q. Are you acquainted with the Young ditch, that Mr. Young has testified about? A. Yes, sir.

Q. You have heard that testimony here in the courtroom? A. Yes.

Q. Are you the Hotchkiss mentioned in that testimony, as having an interest with Mr. Thornburg in the ditch which leads from the river on the west side?

A. I am.

Q. That was formerly to serve what was known as your property and the Voegtly property, wasn't it? A. Yes, sir.

(Testimony of Hull Hotchkiss.)

Q. That ditch was there at the time the decree in 1901, the original decree in this case, was rendered?

A. Yes, sir.

Q. At that time was there a dam in the river?

A. Yes, sir.

Q. Where was that dam, Mr. Hotchkiss?

A. That dam was down about—somewheres down about 300 yards south of the north line of section 30.

Q. You have been acquainted with that dam for how long?

A. Ever since it has been put in. In fact, I helped put it in. [311]

Q. You have lived there how long? How long have you lived there?

A. Going on 28 years.

Q. How long have you lived upon land where you have used the water from what is known as the Hotchkiss ditch? A. 25 years.

Q. You helped build the old Young dam, or the Young dam?

A. I helped build that, before I became owner of this land.

Q. In the construction of that Young dam, were there boards across the front of it which were a part of the permanent structure? A. Yes, sir.

Q. How high were those boards?

A. Well, there were three-inch boards put in, and the slope, I suppose would make them about 30 inches, something like that.

Q. They were put, the pieces running upright—or

(Testimony of Hull Hotchkiss.)

rather, the pieces of the bridge against which the movable boards will stand, on a slant? A. Yes.

Q. These boards were nailed at the bottom just as the movable boards would be if they went on down?

A. Yes.

Q. There were three 12-inch boards on that slant?

A. Yes.

COURT.—That is the old dam you are talking about?

Mr. WEBSTER.—That is the old dam, if your Honor please.

Q. When the boards were out of the old dam, what would be the condition of the water in the river at the head of your ditch there?

A. I would be getting a good head of water out at the present time.

Q. If the old Young dam was there, as it always had been?

A. As it was maintained before the decree. [312]

Q. At the time when that decree was rendered, how was the water carried down in the ditch to your property? What kind of a ditch was it, compared with what it is now?

A. Well, that ditch there then was about ten foot wide, and we afterwards put that headgate in; that narrowed it down to three-foot four in width, and it is about three and a half feet deep.

Q. Well, leaving the headgate, going down the ditch along the road there, what is the condition of the ditch now in respect to what it was at the time the decree was rendered?

(Testimony of Hull Hotchkiss.)

A. Well, that there road has been throwed up—no, the road was throwed up before this decree—but we get the water just the same. It don't help me a bit in the world.

Q. Nor hurt you? _____

A. No, neither helps nor hurts.

Q. Well, does it result in any greater waste of water coming down there than it did before the decree was rendered? A. No, it does not.

Q. This water comes to you and from you on down to the Voegtly place, doesn't it? A. Yes.

Q. Well, what is the condition of that old Young dam now?

A. Well, there ain't but very little left of it.

Q. It is no obstruction to the water at all?

A. Not a bit.

Q. Nor has no use as a dam?

A. Has no use as a dam at all.

Q. Hasn't been used for how long?

A. I don't think it has been used for the last seven or eight years.

Q. Do you know of another dam that has been constructed up just north of the section line of 30?

A. Yes, sir. [313]

COURT.—You say the old dam has not been used for when?

A. For seven or eight years. ,

Q. And you are acquainted with that new dam?

A. Yes, sir.

Q. How high is the board across the front of that

(Testimony of Hull Hotchkiss.)

dam constituting a part of the permanent structure?

A, Well, it would be right around a foot, I think, I never measured it.

COURT.—Let me inquire. In the Young case, I understand that new dam was in litigation; that is to say, the construction of it and the boards in it. What judgment was entered in that case as to that new dam?

Mr. WEBSTER.—There wasn't any. Mr. Young was required to remove the boards. That is all.

COURT.—Clear down to the floor?

Mr. WEBSTER.—No. The evidence showed there were some boards there floated in, some movable boards had either floated in or he put them in. The evidence showed that when he took the boards out that he had had the removable boards in there, and that when he took them out, he didn't take them all out, but he took out what he claimed was enough to allow the free flow of the river. The Judge said that was not enough; he had to take them all out.

COURT.—He had to take them all out down to this permanent board?

Mr. WEBSTER.—Yes.

COURT.—Is that your understanding?

Mr. TREADWELL.—I think Judge Webster is correct in stating he was cited for contempt for diverting the water, having the boards in to divert the water. At that time it developed that we didn't know [314] that this new dam had been constructed. In drawing our affidavit, we simply as-

(Testimony of Hull Hotchkiss.)

sumed from the report that the boards were in, that it was the same as the old Young dam. On the hearing, it then developed that it was a new dam that they had constructed. And it was then shown the circumstances under which it had been constructed, and the Court held, in the way of an opinion, that not only had they violated the decree, by putting the boards in and using it, but that also the whole thing was in violation of the decree and he was told that he could purge himself of the contempt by paying the costs and only obstructing the river in the way he had done before, namely by the old dam.

Mr. WEBSTER.—We will discuss that when we come to the argument.

COURT.—Yes, I was wondering whether we were relitigating an old subject.

Mr. TREADWELL.—We certainly are, your Honor. He was required to remove that dam, according to my contention.

Mr. MINOR.—I have the opinion.

Mr. WEBSTER.—I will read it if your Honor wants to hear it. This man was never cited for any contempt for building that dam.

Mr. TREADWELL.—No, but he is cited now.

Mr. WEBSTER.—Yes, he certainly is. He knows that. He has a suspicion of that kind.

Q. Now, Mr. Hotchkiss, if you took the new dam out, and put the old Young dam back in, with the removable boards all out, what would be the condition of the river, as to the height of the river then, up

(Testimony of Hull Hotchkiss.)

above where the new dam is, where the new dam is now?

A. It would be up about on a level with where the new dam is now, where the water stands. There is practically no fall there, from the new dam down to the old dam. That water stands practically [315] dead.

COURT.—How much water do you claim you were entitled to through the Hotchkiss ditch?

A. Sufficient to irrigate that land. There is no amount specified.

COURT.—How much land have you got there?

A. I have a quarter section.

Mr. WEBSTER.—When the dams are open, the decree gives them the right to all water naturally flowing in the ditches.

Q. After the old dam rotted out, and the new dam was put in, you constructed a short ditch from above the new dam connecting with your ditch system, didn't you? A. Yes, sir.

Q. And I want you to tell the Court whether, with that construction all open and the new dam open you get any more water in your ditches than you would in the old way as it was when the decree was originally rendered? A. I do not.

Q. Do you get any more water—will you get any more water with the boards in the dam, through your system than you would with the use of the old dam as it was at the time the decree was rendered?

A. No.

(Testimony of Hull Hotchkiss.)

COURT.—What period of time were you entitled to use that water?

A. Well, the water that would flow out of the ditches without any obstruction, it could come out any time, but we put the boards out the 12th of May.

COURT.—That is, to divert the water?

A. Yes, so as to divert the water.

COURT.—You put the boards in so as to divert the water, the 12th of May? [316]

A. Yes, sir.

COURT.—But you are not entitled to have the water come out of there before that time?

A. My understanding is we are, such water as will naturally flow.

Mr. WEBSTER.—Such water as will come without the boards being in?

COURT.—Without any obstruction in the river.

A. Yes.

Mr. WEBSTER.—Without the boards being in the dam, with the dams open, they are entitled to the flow in their ditches.

COURT.—Then I understand you, without the boards being in the dam, the water is diverted above your dam now, out into the Hotchkiss ditch?

A. I didn't quite understand that.

COURT.—I asked you, without the boards being in the new dam, any of the boards being in the new dam, and in the situation the dam is in, at the present time, the water is diverted out into your ditch?

A. Yes.

(Testimony of Hull Hotchkiss.)

COURT.—And the diversion comes through the connection that you have made from your ditch to the channel of the stream? A. Yes.

Q. And if the new dam was all out, and the old Young dam was in, and open, would the water then flow into your ditch?

A. It would be practically the same.

Q. The same as it does now? A. Yes.

Q. So that the only difference is that the water is coming out of the river into your ditches a few feet above what it would if the old Young dam was in as it was at the time of the decree? A. Yes.

COURT.—Did you have a survey made and levels taken at the [317] time you constructed the new dam, to ascertain whether or not you were raising the water any higher than the old dam raised it?

A. I never had anything to do about building the new dam. I hadn't a thing in the world to do with it.

Q. That was built by Mr. Young and Mr. Hanley?

A. I don't know who it was originally built by.

Mr. WEBSTER.—There are several other charges, different places, against this defendant. What other one?

Mr. TREADWELL.—A new dam.

Mr. WEBSTER.—You charge him with the new Voegtly dam?

Mr. TREADWELL.—No, I guess not. I guess this is the only place he is charged.

Mr. WEBSTER.—You had his name in a time or two?

(Testimony of Hull Hotchkiss.)

Mr. TREADWELL.—That was by mistake, and it was stricken out.

Mr. WOOD.—He is in twice, though.

Mr. TREADWELL.—He is charged with the new dam, the new Voegtly dam.

Mr. WEBSTER.—Is he?

Mr. TREADWELL.—Page 6 of the affidavit.

Mr. ERSKINE WOOD.—He is charged with Thornburgh with putting hay and manure in the old Voegtly dam.

Q. Do you know the old Voegtly dam, Mr. Hotchkiss? A. Yes, sir.

Q. And do you know about the new dam that is being constructed there? A. Yes, sir.

Q. Have you any interest in those properties, any of them? A. No, sir.

Q. Well, have you had anything to do with the construction of them, and if you have, tell the Court what it is.

A. I never have had anything to do with them.
[318]

Q. Nothing at all? A. Nothing at all.

Q. Never helped build them?

A. I did help build the old one, but I was working for Mr. Voegtly at the time.

Q. When was that?

A. That was in the fall of 1895.

Q. Oh, yes. I guess they don't go that far back. Have you been hauling manure and putting it down there? A. No, sir.

(Testimony of Hull Hotchkiss.)

Q. Or stack bottom, or anything? A. No, sir.

Q. Had anything to do with it?

A. Not a thing.

Q. Last year, or this time, or any year?

A. At no time—no time whatever; never have had anything to do with it.

Mr. WOOD.—I would like to ask you a question. You don't seem to have done anything, but I want to know whether Mr. Hanley aided or abetted you in doing it? A. No.

Mr. WOOD.—Ever have any talk about your doing it, about your irrigation? A. No.

Q. You know the Voegtly dam, you say?

A. Yes.

Q. Do you know whether it has been used, or not, the last several years?

A. It has been used continuously since 1895.

COURT.—At what time in the year?

A. Well, I think from the 12th of May till the 1st of July. That I would not be positive of.

[Testimony of Hull Hotchkiss—Cross-examination.]

Cross-examination.

(Questions by Mr. TREADWELL.)

Just one or two questions. When did [319] you put in the ditch from the new Young dam that connects with your old ditch?

A. I think this will be the second year. I would like to state to the Court that that was put in just temporarily till we put in our own dam.

Q. You intend to put in another dam, do you?

(Testimony of Hull Hotchkiss.)

A. We intend to put in a dam where the old dam stood.

Q. Is Mr. Young going to join with you in that, too? A. Yes.

Q. So that is the program, is it? A. Yes, sir.

COURT.—You are going to tear out the new dam?

A. I have nothing to do with it.

Q. When did you open the ditch this year?

A. I took the board out of the headgate there, I think along about the 1st of March, if I remember right.

Q. There really is not any headgate in your ditch, is there? A. There sure is.

Q. Well, I wasn't sure. Is there a headgate in it?

A. Yes.

Q. A wooden structure? A. Yes, sir.

Q. You took the boards out?

A. I took one board out—the top board. There is four eight-inch boards in there.

Q. The 1st of March?

A. Along about that time.

Q. And had water there ever since? A. Yes.

Q. That stands on both sides of the county road, don't it? A. Yes.

Q. And about 16 feet wide across the surface, isn't it, the water? A. I guess it is, yes.

Q. How deep do you suppose you keep it standing there along that road? How deep is that hole down there?

A. Well, in the lowest place—in that lowest place in 19, some [320] place along around a foot.

(Testimony of Hull Hotchkiss.)

Q. Only a foot deep?

A. I mean on the level ground, right on the meadow.

Q. That is not what I am talking about. I am talking about in these two ditches along the road, where it is 16 feet wide, how deep is it?

A. Right there, I suppose it would be right around two feet.

Q. Isn't it a fact that you keep it up so high there, that it has backed out onto Mr. Hanley's section 19?

A. It backs up onto 19.

Q. Does that belong to Mr. Hanley's company?

A. Yes.

Q. Backs right up there on it, subirrigates it, in fact irrigates the surface of it?

A. It irrigates part of it.

Q. You keep the bank up in your land—you have it banked up along your property all along the road, haven't you?

A. Yes, I have. There is several cuts there.

Q. Instead of letting it flow freely, onto your property, you keep it banked up, and hold it—have a little levee along there, to keep it kind of off your property?

A. You understand about the center of my land, there is a low place that I am obliged to levee up to force it over to the west side.

Q. The west side of what?

A. The west side of my place.

Q. So in order to get it over here, you hold the water up, and levee it up, to force it clear over there,

(Testimony of Hull Hotchkiss.)

and that also backs it up on Mr. Hanley? A. Yes.

Q. What arrangement have you with Mr. Hanley as to 19? A. Not a thing.

Q. Which section have you got jointly with Mr. Hanley? [321] Oh, I beg your pardon, I was thinking of Mr. Thornburg, instead of yourself, Mr. Hotchkiss. Then the water, after it runs off you, goes down onto Mr. Thornburg?

A. Yes, goes onto Thornburg.

Q. You have had water there all of March and all of April, this year? A. I think so.

Q. You are keeping right on having it?

A. Yes, sir, I am.

[Testimony of Hull Hotchkiss — Redirect Examination.]

Redirect Examination.

Q. When you say you expect to build another dam, you mean to restore the old Young dam, just as it was at the time the decree was made?

A. Yes, sir.

Q. And as the decree permitted?

A. Yes, sir, as the decree permitted.

COURT.—You say you are going to rebuild?

A. All three of us.

COURT.—You and Voegtly?

A. I and Thornburg and Mr. Young.

COURT.—Then as far as you three are concerned, you will abandon the new dam?

A. Why, I never have had anything to do with it.

[Testimony of Hull Hotchkiss — Recross-examination.]

Recross Examination.

Q. You built your ditch up ahead of it, didn't you, to get the benefit of it?

A. Yes. Well, I get that benefit of it; I will admit that. But it was only till we could get this other dam put in. We don't take any more water.

Redirect Examination.

Q. Let me ask again—I am afraid I didn't get it—speaking of the ditches that lead out and the levees that you answered about [322] here, is that in the same condition, or isn't it in the same condition as it was at the time when the decree of 1901 was rendered? A. Yes, sir.

Q. Has stayed that way ever since?

A. Stayed that way ever since.

Witness excused. [323]

[Testimony of Carey Thornburg—Direct Examination (Portions of).]

CAREY THORNBURG, a witness called on behalf of the defendants, being first duly sworn, testified as follows.

Direct Examination.

(Questions by Mr. WEBSTER.)

You live in Harney County?

A. Yes, sir.

Q. How long have you lived there?

A. I have lived in Harney County about 30 years.

Q. What is your business?

A. I have got a little ranch up there.

(Testimony of Carey Thornburg.)

Q. Whom did you get it of?

A. Charley Voegtly.

Q. When did you buy it?

A. I bought it in the fall of 1900.

Q. Fall of 1900. Got a deed to it then?

A. Yes, sir.

Q. Owned it ever since? A. Yes, sir.

Q. What is the description of it, do you know?

A. It is meadow land.

Q. I know. I mean the legal subdivisions. Do you know what they are?

A. Well, I don't.

COURT.—What section is it in?

A. In section 30.

Mr. TREADWELL.—It is the southwest quarter of section 30.

A. The southwest quarter of section 30.

COURT.—That would be this quarter here?

A. Yes.

Q. Where do you get, or have you been getting water for irrigation there?

A. From this old Voegtly dam. [324]

Q. Do you get any water from the Hotchkiss ditch?

A. I do when there is a surplus of water turned out above, and all gets mingled together, I get a benefit from the upper part there, from different sources.

Q. Was that the ditch that Mr. Voegtly got his water from—that Hotchkiss ditch?

A. I think he got some water from there, yes.

(Testimony of Carey Thornburg.)

Q. Were you acquainted with the Young dam, the old dam that was in there on George Young's property?

A. Why, that old dam was in action some time after I bought this place, several years, yes.

Q. Are you acquainted with a new dam that has been built up above there on 31? No, not 31.

A. 19.

Q. 19, yes. A. Yes, I have seen it.

Q. Just above the north line of 31. Are you able to tell the Court anything in reference to the relative height of these dams when the boards were out, the old dam and the new dam, as to making obstructions in the flow of the river?

A. Well, I should judge they were about the same on about the same level.

Q. Have you any interest in the new dam?

A. None whatever.

Q. Did you construct the little short ditch that leads from above the new dam into the Hotchkiss ditch?

A. I did not; didn't have a thing to do with it.

Q. That, however, carries water down through a system that does take the water onto you finally?

A. Yes, sir.

Q. Where do you get the most of your water?

A. From the old Voegtly dam; always have.

[325]

Q. You always have got it from there, ever since you have had that place? A. Yes, sir.

Q. How do you get it out from there?

(Testimony of Carey Thornburg.)

A. By putting the boards in and making it overflow the banks in those little natural cuts that are there, and they are all small, but I get the most benefit from subirrigation system along the river there. The banks are high, and it would be impossible to get it from any other source only from that old Voegtly dam.

Q. And you get a subirrigation more than you do the surface irrigation? A. Yes.

COURT.—That is subirrigation from the river itself? A. Yes, sir, when the boards are in.

Q. Is there a ditch leading out from that dam to the west there?

A. There is a ditch; yes, there is a ditch from the Voegtly dam.

Q. From the Voegtly dam. I think it is on this little map here.

A. Leading out from that dam above the dam, right here, but it was built more for a drain ditch, from the low grounds on Mr. Smith, and also myself; in high times, it leads this water off, you know. But in irrigation time, I keep that ditch closed up, practically closed up. When I have got the boards in the Voegtly dam, if I didn't, it would run out so much that it would be a damage to me.

Q. Now, before I go further into that Voegtly dam, I want to ask you whether you take from the Voegtly dam, and the little you get from the Hotchkiss ditch—whether you take more water [326] for the irrigation of your land than was formerly taken through the Hotchkiss ditch, and brought

(Testimony of Carey Thornburg.)

around there to irrigate that land?

A. Why, I would have to take out more if I had to abandon this dam.

Q. Do you mean if you abandoned the Voegtly dam, it would take more water brought around by the Hotchkiss ditch, to irrigate your land, than it does the way you do? A. Yes.

Q. Is that a fact?

A. That is a fact that can be proven right along.

Q. That using the Voegtly dam as you do, you use less water than you would if you brought the water around through the Hotchkiss ditch?

A. Yes, sir.

Q. I believe you are now building a new dam there above the Voegtly dam? A. Yes, sir.

Q. Who is doing that? A. I am.

Q. You employed Mr. Smith and these other people to work on it, did you? A. Yes, sir.

Q. What is that being built for?

A. To take the place of this old dam; that is immediately above to take the place of this old dam.

Q. The old Voegtly dam is worn out?

A. Yes, it has washed underneath, and impossible to use it any longer.

Q. What is the condition of the river there, with reference to being wide or narrow about this place?

A. It is wider there than most any place along that river, above [327] or below either.

Q. How far above the old dam is the new one?

A. Oh, about 50 feet, I should judge. I never measured it.

(Testimony of Carey Thornburg.)

Q. What is the channel, or what is the flow of the river there? Is it rapid or sluggish, or what?

A. No, it is sluggish—slow.

Q. Almost no channel at all? I mean almost no flow at all there?

A. There is scarcely any flow at all.

Q. What is the opening in the new ditch, the opening for the water to go through?

A. The new dam?

Q. Yes, ditch, I said—the new dam.

A. It is 15 feet, 8 inches, in the clear. We measured it.

Q. Is that enough for the whole of the river to go through there without obstruction?

A. Well, I think it is.

Q. Is the new dam as constructed, when it is open, any greater obstruction to the flow of the river than the old Voegtly dam was, when it was open?

A. I don't think it would be any greater obstruction at that point, because the river is wider there than it is below or above, and this dam is as wide—this dam is as wide as other dams above me.

Q. How is it with reference to Smith's dam?

A. It is wider than the Smith dam.

Q. You mean the opening is wider? A. Yes.

Q. How is it with reference to the dam that has been called the Hanley dam up in section 19?

A. It is wider than that, too, some wider. [328]

COURT.—It is not as wide as the old dam, though?

A. No, it is not as wide as the old dam.

(Testimony of Carey Thornburg.)

COURT.—What is your idea for making that narrower, making the opening narrower in that dam than the old one?

A. Because I thought it would be less expense to keep up that width dam than it would be this wide dam that was put in there clear across the river. I didn't think it was necessary to have it in there so wide, you know. But it would not obstruct the flow of the river a particle; when the water is high enough so that dam will obstruct the flow of the river, it would run out of its banks all along.

Q. This new dam is a more expensive dam to build than the old one anyway, isn't it?

A. Yes, it is.

Q. But it is not so expensive to keep up?

A. Not so expensive to keep up.

Q. How long have you used that old Voegtly dam?

A. I have used it myself 15 years.

Q. Right straight along all the time?

A. Every year.

COURT.—At what time of the year?

A. Why, from the 12th of May till the 1st of July.

Q. How did you come to use it just from the 12th of May till the 1st of July?

A. Well, I suppose that that dam was decreed in the place of the one above, which I have learned since, Voegtly signed up there, instead of where he should sign up for this dam.

Q. You supposed, in other words, this dam was in the decree and it is not, eh? [329]

(Testimony of Carey Thornburg.)

A. That is what I always thought, but I found out different.

Q. When did you get the idea that it was not? When did you learn that that was wrong?

A. Well, since this trouble arose, and we got to looking at it, looking it over.

COURT.—You have had all the water you wanted there, by using that from May 12th on?

A. Yes, sir.

COURT.—And you had all the water prior to May 12th that you wanted to use?

A. From that time on.

COURT.—No, I asked you first, if you had all the water from the use of that dam, from May 12th on to July? A. Yes, sir.

Q. You said you did? A. Yes.

COURT.—Well, now, at the time prior to May 12th running back into March, did you have all the water on there you wanted to use?

A. I never had any at all.

COURT.—Well, you didn't need any?

A. I didn't need any, no. Didn't want any.

COURT.—That is what I wanted to know about.

Q. All this time, now, Mr. Thornburg, tell the Court whether you have been using that dam in good faith, believing that you had a perfect right to use it—whether you do or do not have a perfect right to use it? A. I have.

COURT.—He has only been using it after May 12th.

Mr. TREADWELL.—We deny their right to use

(Testimony of Carey Thornburg.)

it at all, your Honor.

COURT.—Yes, I understand. [330]

Q. Are you acquainted with Mr. Hanley?

A. Yes, sir.

Q. William Hanley—how long have you known him?

A. Oh, I have known him as a neighbor a good while.

Q. Have you any business connection, or business relation with him now? A. I have.

Q. What is it? Tell just what it is.

A. I am connected with him in this way: I cut hay and stack it, and feed it out by the ton—contract work. That is the only way that I am connected with Mr. Hanley, is by contract, cutting this hay and feeding it out to beef cattle.

Q. On what section do you have?

A. On section 31 and also put the hay up on section 19, right above Young.

Q. All your work is contract work with Hanley?

A. All contract work, the whole thing.

Q. Do you know a dam known as the Luig dam?

A. Yes, sir.

Q. Where is that, with reference to the Voegtly dam, above, or below it? I call it the Luig dam. Is that dam known by another name?

A. I have always heard it called the 31 dam.

Q. Very well, we will call it the 31 dam, if that is more convenient to you, where is that dam with reference to the Voegtly dam?

(Testimony of Carey Thornburg.)

A. It is three-quarters of a mile below the Voegtly dam.

Q. Is that on section 31? A. Yes, sir.

Q. On Mr. Hanley's land? A. Yes, sir.

Q. Did you ever have anything to do with working on that dam? A. Yes, sir.

Q. Whom were you working for?

A. Mr. Hanley.

Q. When was that?

A. Well, I have had the irrigating of that section for the last four years. [331]

Q. Have you interest in the dam yourself?

A. In the Luig dam?

Q. Yes, the 31 dam?

A. None whatever.

* * * * * * * *

Mr WOOD.—While you are looking that up, I will ask him a question. State whether you ever conspired with Mr. Hanley or talked with him, laid your heads together, to take out this water, or do any of these things to bother the company?

A. None whatever.

Q. (Mr. Webster) Well, did Hanley ever encourage you to do any of this?

A. No, sir, he never did. [332]

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[Testimony of Carey Thornburg—Cross-examination (Portions of).]

Q. You also say that you have a cropping contract with Mr. Hanley on section 19. You have seen this water this year going out at the new Young dam, and standing along on the road, and being held up there,

(Testimony of Carey Thornburg.)

and flooded back onto section 19, haven't you?

A. Yes, sir.

Q. That is what is irrigating that section, isn't it?

A. No, sir.

Q. It is irrigating a large part of it, isn't it?

A. Irrigating about five acres, I should judge.

Q. Five acres would be your idea? A. Yes, sir.

Q. You seem to have great faith in subirrigation in that country, haven't you? You say your land can be subirrigated from the river? A. Yes.

Q. You have seen the water there standing not only up to the surface of the ground in the ditch along section 19, but flooding back over it?

A. I don't call that subirrigation.

Q. You don't? A. No, I call that back water.

Q. Did you use the old Young dam while it was in?

A. I never used any of it, no; I never had anything to do with the old Young dam.

Q. Well, the Young dam was put in every year, wasn't it, while it was there? A. Yes.

Q. Did the decree permit you to maintain it, and irrigate your ranch from it—doesn't it? A. Yes.

[333]

Q. It does irrigate the ranch, doesn't it?

A. A portion of it.

Q. Still you say you did nothing about it at all, never touched it?

A. Mr. Hotchkiss has been handling that ditch. It is along his line there, and he has been handling it just about as he wanted to all the time.

Q. You never touched it at all; never irrigated

(Testimony of Carey Thornburg.)

your land at all from that ditch?

A. What water he turned on there, if there was enough to get down on me, it would benefit me.

Q. You saw there was enough, didn't you, all the time?

A. I wasn't interested in that particularly, because I could get all the water I wanted from the old Voegtly dam. That is the reason I didn't pay any more attention to it.

Q. Did you have anything to do with opening the People's ditch this year? A. No, sir.

Q. Do you know who opened it? A. I do not.

Witness excused. [334]

[Testimony of James Dalton—Direct Examination.]

JAMES DALTON, a witness called on behalf of the defendants, being first duly sworn, testified as follows.

Direct examination.

(Questions by Mr. WEBSTER.)

You live in Harney County, Mr. Dalton?

A. Yes, sir; I live in Burns, Harney County.

Q. In the town of Burns? A. Yes, sir.

Q. You have some interest in a ditch out there in that county, not far from the town of Burns, known as the People's ditch, haven't you? A. Yes, sir.

Q. You own some land under that ditch?

A. Yes, sir.

Q. How much? A. A quarter section.

Q. You are connected with it in connection with Mr. Hudspeth here, Mr. Robert Hudspeth, who succeeded to his father's interest, I believe?

(Testimony of James Dalton.)

A. Yes, sir.

Q. And with— A. The Kelley heirs.

Q. Yes, the Kelley heirs. I understand that there is a board across the headgate of that ditch, through which, when you are entitled to take the water—which is removed at times when you are entitled to take the water, leaving an opening through which the water goes? Is that right? A. It is, yes.

Q. About what is the size of that, do you know?

A. No, I don't know the exact size. It was figured out to open a space to let that amount of water go through, which we were entitled to and no more.

[335]

Q. Through that opening that would be made by the removing of that board? A. Yes, sir.

Q. Was there a board nailed on, or fastened on there last year, after the irrigating season?

A. Yes, sir, there was.

Q. How do you know that?

A. Well, Mr. Gilcrest came to my store, and told me that my headgate, our headgate was open, and they had no water at the Island ranch, and he wanted it put back, and the boards taken out of the dam. Mr. Hudspeth was taking out a little water from stock water for his hay. And I told him I would go at once, and fix it, take the boards out of the dam; and did go—went and took the boards out of the dam, let them float down the river. In the meantime, before I started, I hired a man with a team—I didn't know what shape it was in,—and gave him some tools, and nails, etc., and started him down to the dam. It is

(Testimony of James Dalton.)

about five miles from town, and Dr. Geary, one of the Kelley heirs (or his wife, rather), he took his automobile and we went down in his automobile and got there first, and took the boards out of the dam, and let them float down the river. By that time the man came. He put the board back, nailed it in solid and tight with big nails. That was the last time I was there.

Q. That is what I want to get at. What I want to get at, is about putting this particulaar board in the headgate. A. He put it back there.

Q. Who put it back?

A. The man that I sent down there. [336]

Q. Were you there when it was done? A. Yes.

Q. Did you see the way it was put back, or how was it—firmly and securely, or insecurely? Tell the Court just how it was.

A. It was put back firmly, nailed with heavy nails; I saw it and superintended it myself.

Q. When was that?

A. I don't know whether it was July or August. It was in haying time.

Q. Last year?

A. I think it was in August, last year.

Q. When was the next thing that you ever heard or knew about the condition of that board across the headgate there?

A. That was on Sunday, the 25th of April of this year, Mr. Treadwell called me up by phone at my home in town, and told me that our headgate, or board in the headgate, was out, and the water was

(Testimony of James Dalton.)

flowing into the ditch, and asked me if I knew it, and why was it so? I told him I didn't know it, and that I would see that it was put back at once. That was four o'clock on Sunday evening. I went right out and saw Mr. Hudspeth, and Mr. Geary, and told them the circumstances. By that time it was almost six o'clock Sunday evening. We went up to the company's office and saw Mr. Treadwell. He was eating his supper. We told him we would go right down first thing Monday morning, and put that board back; and Mr. Hudspeth did go, and put it back—nailed it up solid—and I went down the next day to see if it was in good, and it was.

Q. So that you didn't know anything about the board being out until Mr. Treadwell told you about it, and then you went and put it in? [337]

A. Not a thing on earth about it.

Q. When you put it back in, did you tell Mr. Treadwell or any of the company?

A. Mr. Hudspeth did.

Q. You didn't do that?

A. I didn't go back, no.

COURT.—Did you need the water at that time on your land?

A. Well, the water, of course it would not hurt the land, but I had no reason in the world to believe that I would not get all the water I wanted after that time, when I had the right to put the boards in. I have used the water 28 years on the place, and there never was a year that I didn't get all the water I wanted, without resorting to a legal means to get it.

(Testimony of James Dalton.)

COURT.—Who else gets water out of this ditch?

A. Most of this water, I think, mingled with this other water that came from the Luig dam they speak of—I don't know. I haven't been down there; don't know what water it was; but it got to my place; that is, some water did. I don't know whether it was this water that was in my ditch, or not.

COURT.—I notice there is a little short ditch running out at the head of the People's ditch, running south to the center of the section; would water go down that ditch?

A. No, sir. I don't know how that ditch ever got there. It has never been used. I never saw any water in it. That was there a good many years ago. There has never been any water in that ditch, that I know of. What little hay that I have raised on the place, would not start in to pay me for being brought down here, and defending myself in this court proceeding for contempt. And I certainly would not start in to take the board out, 10 or 15 days before the time when I had every [338] reason to believe that I would get all the water I wanted after that time.

Q. Well, if you had known that you would not have got a drop of water, or a bit of hay, would you have violated the order of this court?

A. I would not. I positively would not. I would rather have gone and bought the hay. It would be much cheaper than to have undertaken to defend myself in this proceeding. I would rather not have had a spear of hay.

(Testimony of James Dalton.)

Q. Do you know Mr. Hanley?

A. I am acquainted with Mr. Hanley, yes, sir.

Q Did he have anything to do with your management of the water, anything to do with this board? You don't seem to have done anything, as Mr. Wood says, but did he have anything to do with your doing it?

A. Mr. Hanley never did in his life speak to me anything about that water in that country, that I know of; never did.

Q. You live in the same county, though?

A. Yes, we live there but he never mentioned to me about the water—the ditch, or the dam, or anything else.

[Testimony of James Dalton—Cross-examination.]

Cross-examination.

(Questions by Mr. TREADWELL.)

Mr. Dalton, when were you down on the property, prior to the time you learned of the board being out?

A. Well, it was on Tuesday, I think, Mr. Treadwell, we went down.

Q. Before that?

A. No no. I hadn't been there since they put the board back in July or August. [339]

Q. You hadn't been on your property, then, at all that spring?

A. I hadn't been to the dam. I had been to my ranch last fall.

Q. And hadn't been to your ranch at all this spring?

A. Not this spring. I have an old man on the

(Testimony of James Dalton.)

ranch. He is about 80 years old. He and his sister live there. I just give them a home.

Q. So you hadn't been across the ditch at all?

A. No.

Q. Who took the board out, Mr. Dalton?

A. I couldn't tell you, Mr. Treadwell. That is more than I know. I haven't the least idea.

Q. You haven't been able to get any information on that at all?

A. No, sir, I cannot figure out none whatever.

Q. I think the record shows here, Mr. Dalton, there was one time when there was some trouble between the owners of that ditch and the company, a couple of years ago, was there not? A. Yes, sir.

Q. Outside of that, you have always opened that ditch, at the time you were entitled to, and not before? A. Never took it out before.

Q. And no one else took it out before?

A. Not that I know of.

Q. That is the best of your knowledge, the whole time you have known that ditch?

A. Yes, sir, we never took out all the water that we were allowed to take out.

Q. There is no requirement that you shall, I suppose? A. No.

[Testimony of James Dalton—Redirect Examination.]

Redirect Examination.

Q. You were entitled to take water out of there for stock any time of the year, weren't you?

A. Yes, whenever they have water on the Island

(Testimony of James Dalton.)

ranch, the decree [340] provides that we can take water out for stock water.

Q. You can keep on taking water out of there until the water at the Island ranch is reduced to a certain level, and then you will have to quit? A. Yes.

Q. Whenever they notify you. That is all.

Witness excused. [341]

[Testimony of Robert Hudspeth— Direct Examination.]

ROBERT HUDSPETH, a witness called on behalf of the defendants, being first duly sworn, testified as follows.

Direct Examination.

(Questions by Mr. WEBSTER.)

You live in Harney County, Mr. Hudspeth?

A. Yes, sir.

Q. How long have you lived there?

A. 12 or 13 years.

Q. Do you know Mr. Dalton who just testified?

A. Yes, sir.

Q. And you have an interest in the People's ditch? You know of a ditch and a dam, and the works connected with it?

A. Yes. I have a small interest in it, yes.

Q. Your ranch is irrigated from the waters of that, through the People's ditch, is it? A. Yes.

Q. The same as Mr. Dalton's?

A. Yes. That is supposed to be the source. That is what it was built for, was to irrigate that land. That is my understanding of it.

Q. Do you know anything about this board being

(Testimony of Robert Hudspeth.)

out of the dam that Mr. Dalton testified to?

A. I didn't know it was out, until I was notified that it was out.

Q. Now, were you down there across that ditch on the day that Mr. Dalton spoke about it being out, the day before it was fixed.

A. Why, I crossed the ditch on the same Sunday that Mr. Dalton come to me in town, after I got to town.

Q. Oh, on the same day, was it?

A. Yes, on the same day.

Q. Was that on Sunday? A. Yes, sir.

Q. How far below where the headgate is was it that you crossed the ditch? [342]

A. Something like 300 yards; probably 350. It was quite a little ways.

Q. What were you doing when you crossed the ditch?

A. I had a team with some hay on the wagon.

Q. Hauling the hay to town?

A. Yes, taking a little hay to town.

Q. You saw the water in the ditch, didn't you?

A. I saw some water in the ditch, yes.

Q. You were therefore advised, or at least apprehensive, that there was some trouble with the headgate that was letting the water in?

A. Well, I really didn't think anything much about it at the time, until my attention was called to it, and then I began to think that it did look like there was a little more water in the ditch than there ought to be there.

(Testimony of Robert Hudspeth.)

Q. You are all the time entitled to some?

A. Yes, we are all the time entitled to some water.

Mr. TREADWELL.—I didn't understand Judge Webster's question, that he can take stock water in the fall. There is no provision that he can take stock water in the first part of the year. He says that the balance of the year he can take it.

Mr. WEBSTER.—That is the balance of the year.

Mr. TREADWELL.—That is not the next year. It says he may use it from the first of May till the first of July for irrigation; for the balance of that year, after that, for stock. It don't give him any for stock for the first part of the year.

Mr. WEBSTER.—When it comes to discussing the question, we will have something to say on that subject.

Mr. TREADWELL.—All right.

Mr. WEBSTER.—I don't think it makes any difference here particularly. [343]

Mr. TREADWELL.—This was being used for irrigation anyhow. So it is not very material.

Q. Now, when you came on to town, then, did you see Mr. Dalton?

A. Yes, I seen him quite a little bit after I come to town, but I heard he was hunting for me before I did see him.

Q. Then you talked about it; he told you that he had been advised the board was out? A. Yes.

Q. What did you do—you and Mr. Dalton?

A. We went up to see Mr. Treadwell.

Q. What did you tell him?

(Testimony of Robert Hudspeth.)

A. I told him I would go down in the morning and fix it.

Q. What did he say?

A. Well, he didn't—he went on to say something about my crossing the ditch that day, and didn't stop to fix it, and I explained to him I had a team and wagon there, and I really didn't notice anything about the ditch and had nothing to fix it with. There had to be some lumber taken down there. If this board was out, or anything had happened there, there had to be something to fix it with.

Q. Was that all the kick he made to you that Sunday evening about it?

A. I believe that is about all I remember, of any consequence.

Q. What did he say when you told him you would go ahead and fix it Monday morning? Did that seem to satisfy him to some extent?

A. He didn't make any kick about it. He didn't object to my fixing it. I don't know as he said it was all right—don't remember whether he did, or not.

Q. What did you do next morning about it?
[344]

A. The next morning, I took some nails and a board and fixed it up.

Q. You fixed it up yourself? A. Yes, sir.

Q. What time did you get it done?

A. I think perhaps about eight o'clock. I went as early as I could get my breakfast.

Q. How far is that from town?

(Testimony of Robert Hudspeth.)

A. It is four miles on a straight line, and then, from the northwest corner of section 1, over to the dam, that far east. The way I went it would be practically four and a half miles.

Q. Did you notify Mr. Treadwell after you had it fixed? A. I did.

Q. Did you go and see him that time, or call him up? A. Yes, I went to see him when I went back to town.

Q. What did he say when you went back to him?

A. I told him I had fixed it. He seemed to think that was all right.

Q. He didn't kick about that at that time?

A. No. We talked a little about this matter there while I was there.

Q. Now, Mr. Hudspeth, did you have anything to do with the removing that board, or having it removed, or anything of the sort?

A. No, sir. I didn't order anybody to remove it.

Q. How long before that had it been that you had been there?

A. Why, it seems to me I couldn't be positive as to dates, but I was there on horseback the same day that this engineer and Tom Johnson, and a man by the name of Corcoran—they three and me—I saw them out there along looking at the dams above there, in Mr. Thornburg's place. And I supposed they were looking around something there, and I thought I would just ride by there and see. And I rode up on the south side of the ditch, up to the headgate, [345] and waited till they came down there. We

(Testimony of Robert Hudspeth.)

stood there and talked. They done some measuring around there.

Q. How long before was that, do you think?

A. Well, I couldn't say. It seems to me it would be about ten days. And I talked to the engineer about it—called attention to it—and we thought it was 10 or 12 days. Of course it possibly might have been longer, or might have been less. I wouldn't be able to say. I took no note of the time, or anything—don't know.

Q. You didn't open this gate? A. No, sir.

Q. Didn't have anything to do with opening it?

A. No, sir.

Q. Don't countenance anything of that kind—don't want it open?

A. I do not. I don't allow anybody to tamper with that headgate, or do anything with it if I know it. It has been done before—the headgate has been opened before and tore out. One time, I think, three years ago, and when we had the headgate nailed up solid all the season. That was the year in which this trial was down here before, and we didn't attempt to use the dam nor the ditch, either one that year, because the Court ordered that our dam was out of repair—in order to fix this dam and headgate, and comply with the decree.

Q. Do you want to comply with this decree?

A. I do. I certainly do.

Q. Aren't you trying to?

A. Yes. I don't make any pretension to do anything else.

(Testimony of Robert Hudspeth.)

Q. As soon as you are advised, if you are advised anything about it, you get busy and fix it right away, don't you? A. Yes, sir.

Q. Do you live out there?

A. No, sir, I don't live out there. I am out there the most of [346] the time in the winter; when I am feeding, I am out there in that neighborhood, or past there a good deal, especially in this last year, and I stayed down at the ranch most of the time last winter. But along about the first of March, I quit staying down there, and rode backwards and forwards to feed, horseback.

Q. I think I did ask you—was there any water going through ten days before?

Mr. TREADWELL.—Through the ditch, you mean?

Q. Through the ditch.

A. I don't think there was. There possibly was just what would be leaking through the cracks in the boards. That was all the water was going through at that time.

Q. Do you know Mr. Hanley? A. Yes, sir.

Q. He lives there in your county, I believe?

A. Yes, sir.

Q. Have you ever had any talk with him about these dams and ditches—a conspiracy or scheming together to beat the company out of its water?

A. Oh, no, no. There was nothing of that kind between us at all.

Q. Has he ever had anything to do with your dam at all?

(Testimony of Robert Hudspeth.)

A. No, sir, I never see him about the dam—don't think I ever saw him about it in my life. But I did tell men at different times that was working for him that I didn't think knew anything about the effects of this decree—I have spoken to them, that they mustn't interfere with that dam or headgate, or with the ditch in any way.

Q. He has nothing to do with managing your property?

A. No, sir, he has nothing in the world to do with any of my property, or I with his. [347]

[Testimony of Robert Hudspeth—Cross-examination.]

Cross-examination.

(Questions by Mr. TREADWELL.)

Has he ever had anything to do with this ditch?

A. Mr. Hanley?

Q. Yes.

A. Not that I know of. It is my understanding he has no interest. All I know is what my father told me about this decree, when I came there to take charge of the place 12 years ago.

Q. Between the time you were there ten days or so before the time in question, and the time you went across with the load of hay, did you go across the ditch at all?

A. I possibly might; I don't remember.

Q. You were on the ranch during all that period, were you?

A. No, I was in town most of the time. I was

(Testimony of Robert Hudspeth.)

backward and forward once or twice, but I don't remember.

Q. Whenever you do go backward and forward, you have to go across the ditch?

A. No, I don't necessarily. I have a homestead the other side. I sometimes go around the other side.

Q. Did you see water in the ditch that day?

A. Just a small amount, what would be seeping through.

Q. Nothing else? A. No.

Q. Where did the water go that went through the ditch? On what land did it go?

A. That water is supposed to go down—did you ever go down that ditch to where it comes to Hotchkiss' place at the east side of 31?

Q. Yes.

A. That is where our ditch turns down to a fence, to our place. [348] When the snow went off, I put in a dam there. So when we did put in water, that is a square turn that the water will go down, to my part of the ditch, you understand.

Q. Where did this water go, as a matter of fact?

A. This water would go down the ditch, naturally.

Q. On to your property?

A. Some of it would, yes.

Q. Do you know where else it went?

A. It would go down the ditch through 5, supposed to go on through these other people's property at irrigating times. But I don't think there was water enough at that time, even going through the ditch

(Testimony of Robert Hudspeth.)

when the board was out—don't think there was enough water reached the premises.

Q. Do you know who took that board out?

A. No, I don't.

Q. You have never been able to learn who took it out at all? A. No.

Q. Nobody has ever told you that they took it out?

A. No, sir. It has happened before, and I never was able to know who did it.

Q. Whenever you found it was done, you always closed it up?

A. Yes, sir; if it was time that water could go out. Of course if the river was dry, or practically dry, of course, it was unnecessary.

Witness excused. [349]

* * * * *

Portland, Oregon, May 12, 1915, 10 A. M.

[**Testimony of Henry Luig—Direct Examination.**]

HENRY LUIG, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. WEBSTER.)

Mr. Luig, tell the Court where you live?

A. About six miles from Burns, south.

Q. How long have you lived there, Mr. Luig?

A. Well, I have lived there since about 1884, something like that.

Q. Since 1884. You are not very well this morning—you haven't been very well, have you, since you have been here? A. No.

(Testimony of Henry Luig.)

Q. Feel pretty bad. Well, we will get through as quick as we can. You have a piece of land there, haven't you?

A. I have a section four miles from Burns.

Q. Four miles from Burns, yes. Now do you know a dam there that is called the Luig dam?

A. Yes, dam on 31.

Mr. WEBSTER.—He succeeded to the rights of Caspar Luig. There is no use asking him about that. There is no question about that. A. Yes.

Q. Have you used that dam this year? A. No.

Q. Have you put any boards in the dam at all?

A. No. I have never been around there.

Q. You never have been around there at all?

A. No.

Q. Have you done anything with the dam, or to get water out of it at all? [354]

A. No, I have never been around the dam.

Q. Nor not used it? A. No.

Q. Nor not sent anybody else to use it? A. No.

Q. Nor you haven't employed anybody to go there and put in the boards? A. No.

Q. Nor told anybody to? A. No.

Mr. WEBSTER.—I think that covers the charge here. Let us see what the affidavit says: "That in and by the terms of the said decree, the defendant Luig was permitted to maintain one dam in Silvies River, in Section 31, Township 23 South, Range 31 East, from the 15th day of May until the 1st day of July, of each year, and not otherwise, and was re-

(Testimony of Henry Luig.)

quired to remove all of the boards from said dam during the balance of said year; that notwithstanding the said decree, and in violation and in contempt thereof, the said Henry Luig, in the month of April, 1915, completely closed the said dam, by putting the boards therein, and by means thereof, obstructed the water in the west fork of Silvies River and backed the water up the channel of the said river, and by means thereof, diverted in excess of 40 cubic feet of water of the said river, and being all of the water of the said west fork, flowing at said dam, except about four second-feet; and that the said defendant, William Hanley, encouraged, advised and assisted Henry Luig."

Q. You say that you did not put any boards in the dam at all? You were not around there? A. No.

Q. Mr. WEBSTER.—Well, that is all, I guess.

Mr. WOOD.—I guess I can't make him hear. I want you to ask him whether he had any conspiracy with Hanley. Hanley [355] admits that he put them in.

Mr. WEBSTER.—Hanley does say he put them in?

Mr. WOOD.—Yes. Now I want to know whether it was by any kind of collusion.

Q. Did you have anything to do with Mr. Hanley putting the boards in there? Did you tell him to put them in or have anything to do with him putting them in? A. No. [356]

* * * * *

[**Testimony of Henry Luig—Cross-examination**
(Portions of).]

Q. Now, Mr. Luig, ever since you have had charge of the property, you know when you put the boards in. What time of the year?

A. The 15th of April.

Q. The 15th of May, isn't it?

A. The 15th of May,—about there, yes.

Q. Do you ever put the boards in before the 15th of May? A. Hanley fixed it.

Q. Have you ever put the boards in before the 15th of May? A. No, I believe not.

Q. Now, before this year, did you let Mr. Hanley put them in before the 15th of May?

A. I wasn't living there. I don't know.

Q. You have lived there ever since 1884, haven't you? A. No. I live three miles further south.

Q. How long have you lived on Section 6?

A. I can't live there in the spring. It is too wet.

Q. How long have you had that land, I mean?

A. We bought at the same time that Sam Voegtly.

Q. You have had it ever since. You have your house on it? A. Yes.

Q. You are living there now, aren't you?

A. No.

Q. Where are you living now?

A. Living on Sage Hen three miles from there.

Q. You have a house on Section 6? A. Yes.

Q. You were there all this spring, weren't you?

A. No, we moved out in March. [358]

Q. You moved out in March? You haven't been

(Testimony of Henry Luig.)

back there at all?

A. Oh, a couple of times, back over there.

Q. Do you know when Mr. Hanley put the boards in the dam this year? A. No, I don't.

Q. Did you ever let him do that before?

A. I don't know.

Q. Well, did you ever let him do it before this year? A. No, I didn't.

Q. Well, did he ever do it before this year?

A. No, he never done it.

Q. Did you see the water coming down onto your place after he put the boards in? A. No.

Q. You have seen the water on your places, haven't you? A. No.

Q. When these papers were served on you, where were you? A. I was living on Sage Hen.

Q. Had you been to your place at all?

A. I had been there maybe once or twice.

Q. When were you there? A. I don't know.

Q. When were you there, Mr. Luig?

A. Maybe about two weeks ago, before I got the papers.

Q. When did you first see the boards in the dam this year? A. I have never been out there.

Q. You haven't seen them there at all?

A. No, never been around there.

Q. Who is in charge of your property?

A. Oh, before, sometime, I am over there.

Q. Who is in charge of the property during this last month of April? Who was on the property at your house? A. Nobody.

(Testimony of Henry Luig.)

Q. Nobody there at all? A. No.

Q. You didn't go near it? A. No. [359]

Q. Did you go through the property? A. No.

Q. How did you get down to Sage Hen?

A. Oh, on the county road.

Q. You never went near your property during the whole month of April? A. No.

Q. Or during the month of March?

A. Oh, I have been maybe once or twice, over there, but I never was much there. I never seen any water. [360]

* * * * * * * *

[Testimony of John Ryan, Recalled—Direct Examination.]

JOHN RYAN, recalled for the defendant.

Direct Examination.

(Questions by Mr. WOOD.)

Mr. Ryan, are you looking after the irrigation of section 5 this year?

A. Yes, sir.

Q. Did you get any instructions from Mr. Hanley, or anyone, to use the People's ditch in doing it?

A. I did not.

Q. Did you ever meddle with the People's head-gate? A. I don't know where it is.

Q. Well, how is section 5 irrigated?

A. The water—I don't exactly—

COURT.—I think you have been over that.

Mr. WOOD.—I don't want to go beyond the ques-

tion I asked permission to ask.

Mr. MINOR.—I want to go beyond, your Honor.

[**Testimony of John Ryan, Recalled—Cross-Examination.**]

Cross-examination.

(Questions by Mr. MINOR.)

You say you irrigated section 5 this year?

A. What I had, yes.

Q. Where did you get the water?

A. The water comes from the north and—some from the north and some from the east. I don't know where it comes from. I haven't been outside of the section during my work in there. The work has been inside of the section, and using the water that comes.

Q. Some came from the east—is that what you said? A. From the north and from the west.

Q. You said from the east; some came from the north and some [363] from the east.

A. From the north and west.

Q. Where did the water which came from the north come from? A. I don't know.

Q. Where did the water which came from the west come from?

A. I don't know that. As I said, I have not been outside of the section. My work has been inside of the section. I have not been outside of the section line.

Q. Mr. Hanley told you to irrigate, though, did he?

A. To use the water that was in there to irrigate, I suppose.

[Testimony of John Ryan, Recalled—Redirect Examination.]

Redirect Examination.

Q. Mr. Ryan, the People's ditch runs through section 5 to the land below? A. Yes, sir.

Mr. WOOD.—The map will show that, your Honor. That is all.

[Testimony of John Ryan, Recalled—Examination by the Court (Portions of).]

(Examination by the COURT.)

Q. At what time were you irrigating?

A. Oh, I started—I don't know exactly—all spring. April.

Q. All the spring? A. All spring.

Q. March and April?

A. There was no water in that time only just the slough water. I was working there, putting dams in the little sloughs.

Q. That was in April?

A. In the latter part of April, the middle of April. There wasn't much water. [364]

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

WILLIAM HANLEY

APPELLANT

VS.

THE PACIFIC LIVE STOCK COMPANY
a Corporation

APPELLEE

Brief on Behalf of Appellant

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF OREGON
FROM THE DECREE ENTERED AUGUST 3, 1915

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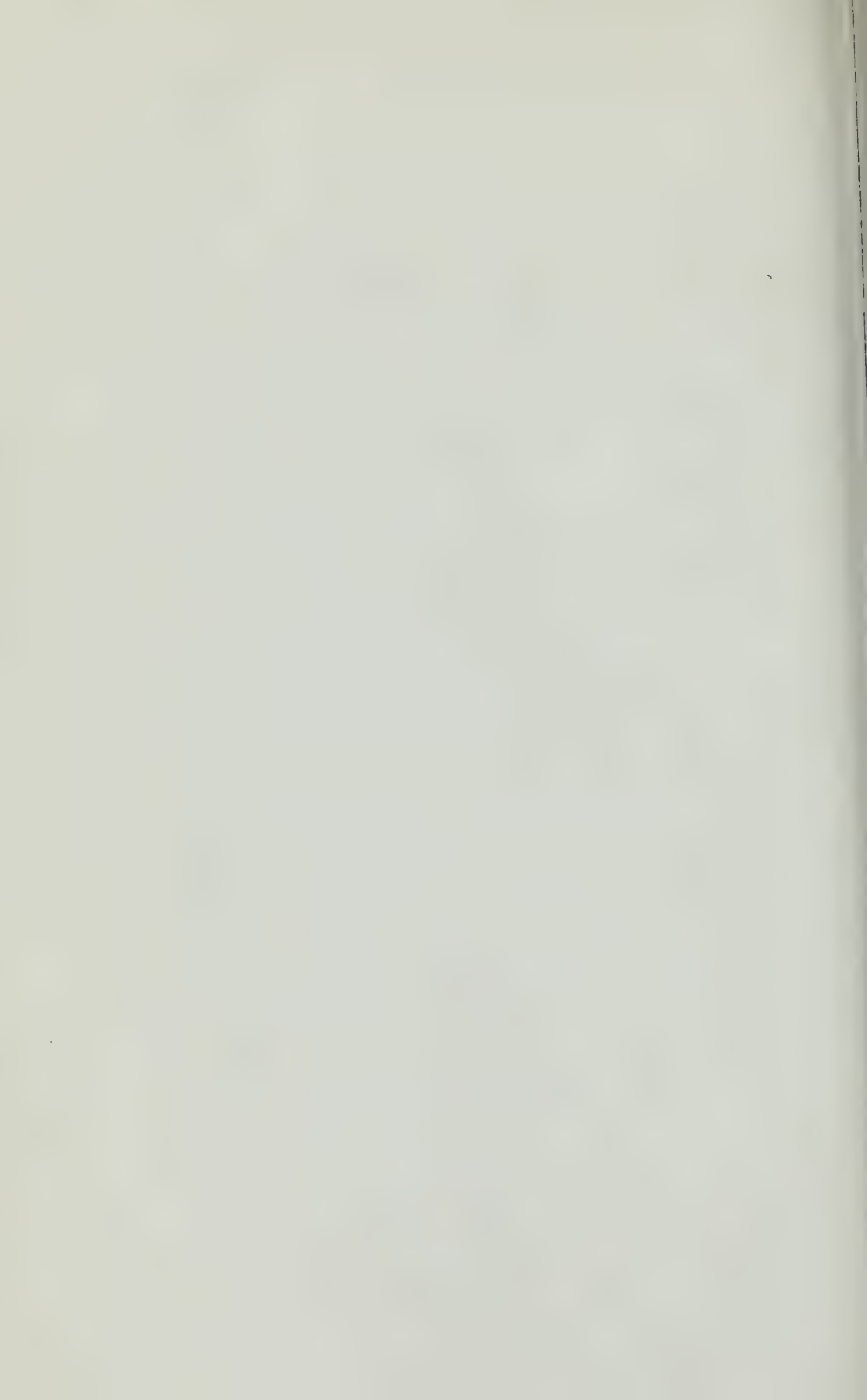
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WIRT MINOR

Attorneys for Appellee

Filed

FEB 11 1916

F. D. Alonchton,
Clerk



IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

WILLIAM HANLEY,
Appellant,

vs.

THE PACIFIC LIVE STOCK COMPANY,
a Corporation,
Appellee.

Brief on Behalf of Appellant

*On Appeal from the District Court of the United
States for the District of Oregon, from
the Decree Entered August 3, 1915.*

STATEMENT OF THE CASE

This is an appeal from a decree adjudging the appellant William Hanley guilty of contempt in violating a prior decree of the United States District Court of Oregon adjudicating certain water rights. A somewhat detailed statement of the case will aid in understanding the contentions made on this appeal.

The Harney Valley is a great flat basin lying in Eastern Oregon, devoted largely to cattle raising and the growing of wild hay. The Silvies River comes out of the Blue Mountains to the north and enters the Harney Valley on the northwest side of it and flows in a general southeasterly course to Malheur Lake in the southerly end of the valley. A few miles south of the point where the river enters the valley it divides into the east and west forks, and those forks continue to flow in a general southeasterly direction toward Malheur Lake, and the country in between them is called "the Island." The main ranch of the appellee, the "Island Ranch," being situated on this island at the lower end, takes its name from that fact. The slope of the valley from the north toward the Malheur Lake is very little and practically imperceptible to the eye, and the Silvies River is a sluggish stream. In the Spring the melting snows in the mountains cause the river to flood over its banks and inundate a good deal of the surrounding country, and give it natural irrigation, from which the wild grasses grow. The silt carried down in the river every year in its annual freshet and deposited along the banks of the river as it overflows, has raised the banks of the river, in the upper part of the valley, above the level of the surrounding country, the rise in the banks being often as much as two feet. But as the river continues southeasterly and gets further away from the mountains from which the silt has come, this elevation of the banks ceases,

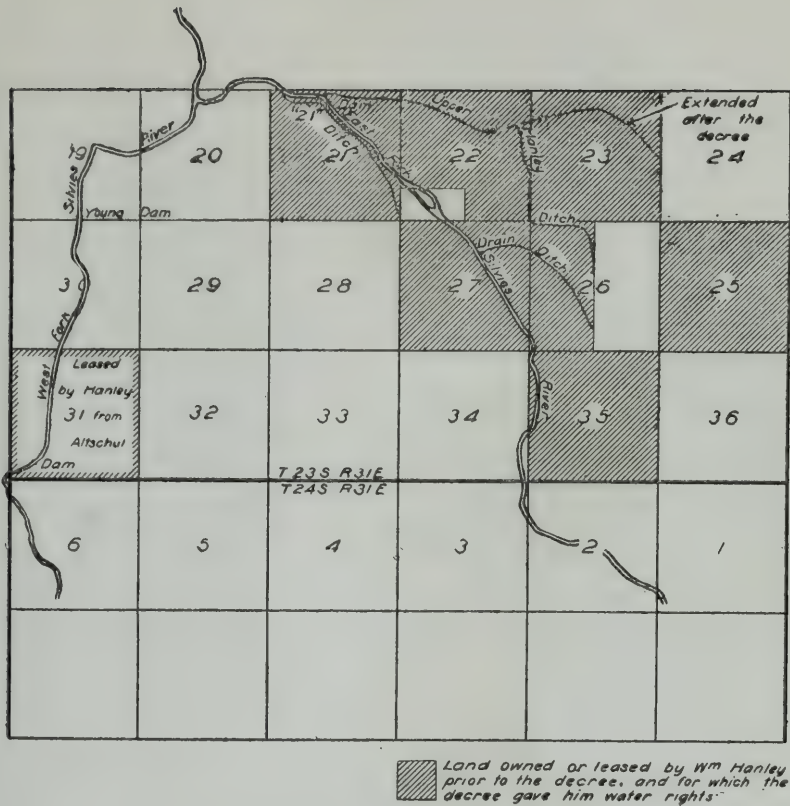
the silt having, as one would naturally expect, been deposited along the upper reaches of the river.

Another peculiarity of the river is that the east fork (we do not know whether the same thing happens on the west fork) gets smaller and narrower and more confined as it flows southeasterly, so that in section 27, township 23 south of range 31 west, belonging to the appellant Hanley, the channel is much more confined than it is a mile or so further up the river, and as the river continues to flow south from Section 27, through Sections 34 and 35, immediately south of Section 27, it practically ceases to be a channel at all and is so little and narrow and crooked and choked up that it does not carry the water that comes down; and in the days before anything was done to relieve this condition, the water spread over Sections 27, 34 and 35 and made them tule and marsh land. Some distance further southeast from these Sections 34 and 35 the channel of the river re-forms again and continues on to the Malheur Lake.

Speaking generally, the main body of the appellant Hanley's land (now the property of the William Hanley Company) lies on the east fork of the river a little below where the river divides into the east and west forks, and above the main body of land of the Pacific Live Stock Company, the appellee, which is further down the river.

October 3rd, 1899, the Pacific Live Stock Company filed in the United States District Court for the District of Oregon, its bill of complaint against

Hanley and a large number of other defendants who were diverting the waters of the river above the Pacific Live Stock Company's lands, the general purpose of the bill being to determine the water rights of the parties to the waters of the Silvies River. The following sketch indicates the lands owned or leased by Mr. Hanley at the time the suit was started, and also shows his dam and ditch system on the east fork of the river as it then existed and the 31 dam on the west fork of the river which he had under lease at the time the suit was started, and also shows the Young dam,—all of which are involved in this contempt proceeding. The Hanley Upper Ditch shown on the sketch is sometimes referred to in the testimony as the "21 ditch," because it is the main ditch leading from the 21 dam. This is a careless use of names. The true 21 ditch is the smaller ditch which the sketch shows on the *west* side of the east fork, paralleling the river bank.



Your Honors will notice that at the time the suit was brought all of the land that Hanley owned was comprised in what is known as the Bell-A ranch on the east fork of the river. This was quite an extensive property and all of Hanley's interests were centered there. He did, however, have Section 31 on the west fork of the river under lease from Charles Altschul. This was the only section he had on the west fork of the river, and we repeat it was only under a lease. This Section 31 was riparian to the river and was watered by the 31 dam, or as it has sometimes been called in this contempt proceeding, the Luig Dam. This 31 dam was

put in the river by Pete Stenger sometime in the eighties. Pete Stenger was the original lessee of this section from Charles Altschul and Hanley succeeded Stenger as lessee and succeeded to his rights in the dam.

The bill of complaint, as far as Hanley was concerned, attacked only his dam and ditch system on the east fork of the river. He was not in any way charged with the use of the 31 dam on the west fork. The bill alleged that Caspar Luig was using a dam there but was silent as to Hanley, and no charge whatever was made against him in the bill on account of his use of the dam which he was using under his leasehold of Section 31. The bill did, however, call upon him to make a full disclosure in regard to his claims as set forth in the bill, and also prayed for an injunction restraining him and the other defendants from diverting any of the water of the river or the east or west fork thereof. Hanley filed an answer in which he set up fully the rights that he claimed under the dam and ditches mentioned in the bill,—that is, his dam and ditches on the east fork of the river, which were all the lands that he owned. He did not set up any right to the 31 dam which he was using as the lessee of Section 31, and which the bill made no mention of. A good deal of testimony was taken on behalf of the complainant and finally various stipulations were entered into between the complainant, Hanley and the other numerous defendants, in accordance with which stipulations a decree was entered. This

decree, in so far as it affected Hanley, followed closely the stipulation between him and the complainant and was as follows:

"That the defendant W. D. Hanley may maintain his dam in the east fork of Silvies River where the same is now constructed and built on and across said river in section 21, township 23 south, range 31 east, Willamette Meridian, and maintain his ditches leading from said dam as the same are now constructed and built from the 5th day of May each year, until the 1st day of July each year, and by means of his said dam and ditches may retain the waters of said Silvies River during said time and divert and use so much thereof as shall be necessary to irrigate Sections 27, 35, 21, 23 and 25, the north half of Section 22, the north half of the south half of Section 22, and the south half of the southeast quarter of Section 22, and the west half of Section 26, all in township 23 south, range 31 east, Willamette Meridian; that the said W. D. Hanley may maintain his ditch constructed across a portion of the land above described leading out of the east fork of Silvies River on the east side thereof on the south half of Section 27 above described and extending southeasterly until it enters into and upon the land of the complainant on or near the southwest quarter of the southeast quarter of section 26, township 23 south, range 31 east, Willamette Meridian, but

shall maintain said ditch for the purpose of draining water from the surface of the land above described and not for the purpose of irrigation. If at any time and while the dam of the said W. D. Hanley is open so that it does not obstruct the flow of the water in said river and from natural causes the waters of said east fork of Silvies River shall overflow its banks upon the land of the said W. D. Hanley, or naturally run through either of the ditches of the said W. D. Hanley leading from the dam of the said W. D. Hanley first above described, said defendant W. D. Hanley shall have the use and enjoyment of so much of the said water of said river as may come upon his land in the manner aforesaid, and during such time as the same may run thereon from natural causes and without any obstruction of the channel of said river."

* * * *

"That the defendants W. D. Hanley (and others, naming them), and each and all of them, and the attorneys, agents, servants and employees of them, and the attorneys, agents, servants and employees of each of them, be and they and each of them are perpetually enjoined and restrained and strictly inhibited from diverting any of the water of Silvies River and any of the water from the east fork of Silvies River and any of the water from the west fork of Silvies River from the channels of said rivers

and from the channels of each of said rivers, and that they be and they and each of them are perpetually enjoined and restrained and strictly inhibited from impeding the flow of any of said water to and upon the lands of the complainant hereinbefore described as the said water has heretofore been wont to flow thereon when not interfered with by the said defendants and by the said intervenor, either jointly or severally, and that they be and they are and that each of them be and he is required to remove all and any dams which they or either of them may have, or which any one of them may have, in the channels of Silvies River or in the channels of the east fork of Silvies River or in the channels of the west fork of Silvies River, and that they be and they are and that each of them be and each of them is hereby perpetually enjoined and restrained and strictly inhibited from rebuilding the same, or any thereof; and that they be and they are and that each of them be and each of them hereby is perpetually enjoined and restrained and strictly inhibited from in any manner obstructing the flow of the waters of Silvies River and from in any manner obstructing the flow of the waters of the east fork thereof and from in any manner obstructing the flow of the waters in the west fork thereof, and from obstructing the flow of the waters of said rivers, or any thereof, in all and in each of the channels thereof, save and

except as is in this decree more particularly set forth.

“20. That this decree shall run in favor of the complainant, its successors and assigns, and against the defendants, their heirs, personal representatives, successors and assigns, and against each of the said defendants and the heirs, personal representatives, successors and assigns of each of said defendants; and against the complainant, its successors and assigns and in favor of the said defendants, their heirs, personal representatives, successors and assigns; and that the waters of Silvies River and the waters of the west fork of Silvies River and the waters of the east fork of Silvies River and the waters in any of the channels of said Silvies River and in any of the channels of the east fork thereof and in any of the channels of the west fork thereof may be used and enjoyed by the defendants only as in this decree is particularly set forth, and not otherwise, and only at the times and in the places and for the purposes in this decree set forth, and not otherwise.”

Some time after this decree was made the William Hanley Company was incorporated and purchased from Charles Altschul, through Mr. C. E. S. Wood, the riparian Section 31, which Mr. Hanley had had under lease at the time of the decree, and also Section 29, both in township 23

south, range 31 east, and Section 5, in township 24 south, range 31 east. All of these came from Charles Altschul, who was the owner of these lands when the decree was made and who was not a party to the original suit. Mr. Hanley, and later the William Hanley Company, during all these years continued to water Section 31 from the 31 dam, in the same way as it had been watered before the decree, and regardless of the decree. In order to irrigate Section 29 the William Hanley Company, some years after the decree, joined George Young in the construction of a dam in the southeast quarter of Section 19, just north of the line between it and Section 30. Young was a party to the original suit and was allowed by the decree a dam for the irrigation of his land in Section 30. This old dam washed out and Young, moving up the river about a thousand feet, put a new dam in as a substitute for the old one, and this is the dam on the south line of Section 19 in the construction of which the William Hanley Company joined him. Young was adjudged in contempt by Judge Bean for the use of this dam and thereafter sold out all interest in the dam to the William Hanley Company, which has used the dam for irrigating Section 29, and possibly, though of this the writer is not sure, for the partial irrigation of Section 5.

Since the entrance of the decree a small ditch was built by some settlers from the east fork of the river in the northeast corner of Section 34, 23 south, 21 east, westerly along the north line of that sec-

tion and into Section 33. This was known as the Orphan Ditch. The land which it served was subsequently acquired by the Pacific Live Stock Company and the ditch became the subject of controversy between Mr. Hanley and the Pacific Live Stock Company and was involved in a contempt proceeding before Judge Bellinger. In the fall of 1914 this Orphan Ditch, together with the headgate where it tapped the river, were greatly enlarged by the Pacific Live Stock Company and the left bank of the ditch was converted into a large levee for the purpose of holding back the water that came from Mr. Hanley's Section 27 onto the Pacific Live Stock Company's Section 34. This levee succeeds in holding back the water as intended.

Another change that has taken place since the entry of the original decree is that the William Hanley Company has bought Section 3 and the south half of the northwest quarter of Section 2, in township 24 south, range 31 east. This is known as the Fennimore Place. Section 3 adjoins the Pacific Live Stock Company's Section 34 on the south. The right to water this Section 3 has also been a subject of controversy, the Pacific Live Stock Company charging Mr. Hanley with a violation of the decree for attempting to water this section, but Judge Bellinger decided that there was no violation, since this section was not involved in the original suit and Hanley had acquired it, and the water rights that went with it, subsequent to the decree.

The foregoing is an attempt to state the condi-

tions existing at the time of the decree and the important changes since then.

Numerous contempt proceedings have grown out of the original decree, and this court has once before had some of these matters before it. (200 Fed. 468.)

The present contempt proceeding was commenced by the filing, on April 29, 1915, of an affidavit sworn to on April 26, 1915, by John Gilcrest, superintendent of the Pacific Live Stock Company, in which the defendant William Hanley was charged with violations of the decree, and an order to show cause was issued requiring Mr. Hanley to appear on May 7th and show why he should not be punished for contempt. The affidavit of Mr. Gilcrest, after stating that the Spring of 1915 was a very "short water" year owing to a light snowfall in the mountains the preceding winter, charged Mr. Hanley with the following violations of the decree:

I.

That Henry Luig had closed the Luig dam before the date permitted by the decree and had diverted water from the river, and that "William Hanley encouraged, advised and assisted said Henry Luig in the acts aforesaid and in the contempt and violation of the said decree as aforesaid."

II.

That the defendants Young, Hotchkiss and Thornburg had built a new dam a quarter of a mile up-stream from the dam permitted by the decree,

with a permanent board across the bottom of the dam to obstruct the water, and had, during the month of April, 1915, before the date permitted by the decree, diverted water from the river and taken it to their lands, and that "in all the acts aforesaid the defendants have been acting under the advice and encouragement and with the assistance of the said defendant William Hanley."

III.

That defendants Hull Hotchkiss and Carey Thornburg obstructed the west fork of the river by placing timbers, boards and other material in the old dam known as the Voegtly Dam, and that in so doing were "assisted, advised and encouraged by the said defendant William Hanley, all in willful contempt and violation of the terms of said decree."

IV.

That defendants P. G. Smith and Carey Thornburg, in the Fall of 1914 and the Spring of 1915, built a new dam in the west fork of the river, which dam was not permitted by the decree, and in doing so were "acting with the assistance, advice and encouragement of the said William Hanley and in willful contempt and violation of the terms of the said decree."

V.

That although the defendant Hanley was enjoined by the decree from using his drain ditch ex-

cept for draining water from the surface of his land, he, during the months of March and April, 1915, at a time when it was unnecessary to drain water from his lands, had the head of his drain ditch open and by means thereof diverted from the east fork of Silvies River in excess of thirty second feet of water, which he used for the irrigation of his land.

That although the defendant Hanley was enjoined by the decree from obstructing the waters of the river by the use of his 21 dam before the 5th of May, yet in March and April, 1915, he placed one board part way across the dam and permitted and suffered a large amount of brush and debris to gather above the dam which raised the water of the river at least one foot higher than the floor of the dam, and by means thereof diverted into the Hanley Upper Ditch more than forty second feet of water, all in willful contempt and violation of the decree.

That although the defendant Hanley was enjoined by the decree from obstructing the waters of the river prior to the 5th day of May each year, and was also enjoined from diverting any water from the river except such as would naturally flow through the Upper Hanley Ditch, yet during March and April, 1915, in willful contempt and violation of the decree, he made the following diversions by means of cuts in the banks of the river on his land described in the decree, to wit:

“In the left bank of the east fork of Silvies River about 900 feet below the Hanley drain

ditch, a cut in the bank of said river about 12 feet in width and 3 feet in depth, diverting about 50 sec. ft. of water from said river; a cut in the left bank of said river about 1000 feet above the south line of Sec. 27, Twp. 23 S., range 31 E., diverting about 6 sec. ft. of water of said river; besides the foregoing, the said defendant Hanley diverted a large quantity of water through numerous smaller cuts in said river through said Sec. 27 and aided the diversion of water through the same as well as the cuts aforementioned, in the following manner:”

And then goes on to state substantially as follows:

That the channel of Silvies River through Sections 27 and 35, township 23 south, range 21 east, is small and sluggish and easily obstructed, and the defendant Hanley in willful violation and contempt of the decree during the months of March and April, 1915, further obstructed the river by maintaining therein on Section 27 the timbers of an old bridge which had been destroyed across the river, and which timbers he permitted to fall and lodge in the river, and also by maintaining another bridge over the river, the stringers of which were set into and below the banks of the river so that they obstructed the flow of the water, and he also permitted to accumulate in the channel of the river and to be caught by said bridges and timbers, the carcasses of dead cattle and hogs and also other

material which obstructed the channel of the river and assisted the water to flow over the banks and out of the low places along the banks of the river and through the cuts in the banks, above described; and by these means the defendant Hanley diverted about seventy-five second feet of water from the river in addition to the diversions above mentioned, and that he did all of these in willful violation of the terms of the decree.

VI.

That defendants Hudspeth and Dalton, during April, 1915, diverted water through the People's Ditch in Section 31, township 23 south, range 31 east, before the date permitted by the decree. There was no allegation specifically connecting Hanley with this, as is the case of all of the other paragraphs of the affidavit, but counsel for the Pacific Live Stock Company stated at the trial that they intended the language in the preliminary part of the affidavit (page 17 of the record), wherein it is said that the defendants "conspired together" to take water from the river, to cover this paragraph VI of the affidavit and to mean that Hanley assisted Hudspeth and Dalton in their alleged violation.

The defendant Hanley filed an answering affidavit on May 6, 1915, the substance of which was that he had been advised by his counsel that he had a right to use the 31 Dam and the Young Dam, as these water lands which were not involved in the

original decree; that he had not conspired with or assisted any of the defendants in their alleged violations of the decree. That while he had not in any way assisted Luig or encouraged him in the use of the 31 Dam, he had himself used that dam and claimed the ownership of it and the right to use it, regardless of the decree, for the reason, as above stated, that it was not involved in the original suit, but on the contrary Section 31 was the property of Charles Altschul at that time, who was not made a party to the suit, and the William Hanley Company had succeeded to the Altschul rights by purchase. That in the same way and for the same reasons he frankly claimed the ownership and the right to use the Young Dam, but that he had not used a drop of water from that dam that year (1915). That he had had nothing whatever to do with the old Voegtly Dam mentioned in paragraph III of the complaining affidavit, nor with the new Thornburg Dam mentioned in paragraph IV of the complaining affidavit. That he had not used the drain ditch at any time when it was unnecessary to use it for drainage purposes and had not used it for irrigation purposes at all, but that when the drain ditch was used by him it was necessary to use it, because the ice had formed solidly in the river channel and formed a dam in it, and as a consequence the water, when Spring came, was blocked by the ice and went out over the land where the William Hanley Company was feeding cattle and had to be drained off by diverting it from the river

channel; and that as soon as this condition ceased he gave orders to close the head of the drain ditch tight in order that the Pacific Live Stock Company might not have any excuse for complaint. That in regard to the one board and the brush in the 21 Dam, he did not place it there or cause it to be placed there. That there may have been one board part way across the dam, but if so it was without his knowledge and could not have had any material effect on the stream. That the dam is as wide as the river and one small board could not have materially affected it. That if there was brush in the dam it was not deliberately gathered and permitted to remain there, but all such incidental obstructions, which are slight and temporary and occur every year, were by his orders removed as promptly as perceived, because he was extremely anxious to avoid any trouble with the Pacific Live Stock Company; and he denies that the board or brush raised the water above the dam or diverted any substantial quantity of water into his ditch. In regard to the charge that he made cuts in the river bank and thereby diverted water, he denies this absolutely, and says that these are natural gaps and depressions in the river bank (the bank being higher than the surrounding country), and that he has caused these natural gaps and depressions to be filled up, and that while he does not know that they have washed out, still they may have done so and the work in filling them may have been mistaken for evidence that he had made cuts in the bank.

That he has not in any way aided or encouraged the other defendants in their alleged violations of the decree, and that he has not obstructed the river with the bridges as charged in the complaining affidavit; that he has built a new bridge as a matter of greater convenience, but neither it nor the old obstructs the flow of the river. That in regard to the carcasses of cattle in the river, he tried to keep all cattle away from the river during the winter time for fear of their breaking through the ice and drowning. That he heard there was one hog in the channel drowned and that was all that ever came to his knowledge, and that he has made special efforts to end this perpetual litigation with the Pacific Live Stock Company and to try to use the water harmoniously, and to that end he has foregone some of his own rights and suffered injustices, but to no avail. That the Pacific Live Stock Company is attempting to monopolize the waters of Silvies River and to terrify all those who oppose it, and is diverting water in the Upper Silvies Valley up in the mountains without any right, and has enlarged the Orphan Headgate and ditch, and by the construction of a large levee along the south bank of the Orphan Ditch has flooded the water back on the William Hanley Company's Section 27 and held the water there to a depth of two or three feet, destroying the hay on two or three hundred acres, and has done this although Judge Bellinger, in a previous contempt proceeding, ordered the Pacific Live Stock Com-

pany to keep the Orphan Headgate in good repair, as it then existed (it at that time being a very small gate).

The case was tried before Judge Wolverton on the 7th of May, occupying perhaps three days in hearing, and subsequently Judge Wolverton rendered an opinion in which he exonerated the defendant Hanley from any of the charges of conspiracy made in the complaining affidavit and found that he had not assisted, encouraged and aided the other defendants in the violations of the decree, as the complaining affidavit charged, but found him guilty of violating the decree in the following particulars: (1) In using the 31 Dam and thereby diverting water from the west fork of the river onto Section 31; (2) in maintaining the Young Dam for the irrigation of Sections 29 and 5; (3) in operating the drain ditch at a time when it was not necessary to drain the surface of his lands; (4) in obstructing the flow of the river through the 21 Dam by permitting one board and some brush to remain in the dam; (5) by failing to repair the breaks in the river bank in Section 27.

The trial judge concluded his opinion by declaring that defendant Hanley's violations of the decree were willful. The decree entered upon this opinion was that Hanley might purge himself of contempt by keeping the 21 Dam open, as required by the original decree, by closing the drain ditch *"so as to prevent the same from diverting water from said river or from being used except to drain surface*

water from the lands described in said decree," and by keeping the breaks in the river bank in repair and by paying six-eighths of the complainant's costs, amounting to \$332.80, and in addition a fine for the benefit of the complainant of \$250.00; and the decree enjoined Hanley from using the Young Dam or the Luig Dam in Section 31, and required him to remove the remains of the old bridge across the east fork of Silvies River.

From this decree defendant Hanley appealed and we prepared a condensed record for the appeal, in accordance with Equity Rule 75, which record the trial judge ordered supplemented by sending the whole of the original record of this case, since its inception in 1899, to the Circuit Court of Appeals for inspection if desired.

SPECIFICATIONS OF ERROR

I.

The court erred in holding that Hanley's use of the 31 or Luig Dam was a violation of the decree, and in restraining him from further use of it, for these reasons, among others:

1. Hanley was not charged in the complaining affidavit with using the dam, but only with encouraging, advising and assisting Henry Luig to use it, and as contempt proceedings are quasi criminal Hanley cannot be found guilty of any contempt which is not specifically charged against him in the complaining affidavit.

2. The 31 Dam and Hanley's rights to it were not involved in the original suit. At that time Section 31 and its water rights were owned by Charles Altschul; Hanley was merely his lessee. Charles Altschul was not a party to the suit and his rights have never been adjudicated. Since the entry of the original decree the William Hanley Company, by purchase from Altschul, has succeeded to his rights.

3. Even if William Hanley as an individual were personally bound as to Section 31, the William Hanley Company, a corporation, in which he is not the only stockholder holding extensive interests, which corporation acquired Section 31 from Altschul without the title passing through Hanley, would not be bound.

4. The court's ruling is an attempt to adjudicate important property rights in a summary contempt proceeding, which is a thing never allowed.

II.

The court erred in enjoining Hanley from using the Young Dam for substantially the same reasons as above stated in regard to the 31 Dam.

III.

The court erred in holding Hanley guilty of a violation of the decree in his use of the drain ditch for the reason that the vidence shows that Hanley used the drain ditch only when it was necessary to do so, as permitted by the decree.

IV.

Even if Hanley be considered to have violated the decree in the use of the drain ditch, the purgation of the contempt required by Judge Wolverton's decree is unwarranted and erroneous, this requirement being that Hanley must keep the drain ditch closed "*so as to prevent the same from diverting water from said river*, or from being used except to drain *surface* water from the lands described in said decree." The words in italics are what we take exception to.

V.

The court erred in holding that Hanley had used his 21 Dam in violation of the decree for the reason that the evidence does not show facts constituting a violation.

VI.

The court erred in holding that Hanley was guilty of a violation of the decree in not keeping the breaks or cuts in the river bank closed, for the reason that the original decree does not require him to do so, and it is in fact at times impossible to do so, and the evidence shows he did his utmost to keep them closed. The requirement that Hanley, to purge himself of contempt, must keep these cuts closed, is unwarranted and erroneous.

VII.

The court erred in holding that Hanley was guilty of any violation of the decree whatever, and particularly in holding that his violation was willful.

ARGUMENT**THE 31 OR LUIG DAM**

The complaining affidavit does not charge Hanley with the violation for which the court found him guilty. There was a variance.

The scope of contempt proceedings is limited strictly to the charges made in the complaining affidavit or information. The proceeding is quasi criminal. In this case Hanley, so far as the 31 dam is concerned, was found guilty of a contempt which is not charged against him in the complaining affidavit.

The only charge made against Hanley in the complaining affidavit in regard to this dam is that he assisted Henry Luigi to use it in violation of the decree. The language is that Henry Luigi diverted water by means of the dam before the date permitted by the decree and that "the said defendant William Hanley encouraged, advised and assisted said Henry Luigi in the acts aforesaid and in the contempt and violation of the said decree as aforesaid." (Record, p. 18.) In short, the charge was

one of conspiracy between Hanley and Luig to violate the decree. The proof of this charge failed utterly, but Hanley frankly admitted that he, independently of Luig, had used the 31 Dam for a great many years to irrigate Section 31 and Section 5; that he had used it regardless of the decree and considered it outside of the decree, and that he had used it during the season complained of—1915. For this the trial judge found him guilty of contempt and made an order forever restraining him from using this dam. This was clearly erroneous, as Hanley was held guilty of contempt for an act which was in no way charged against him in the affidavit and which he voluntarily admitted in order to be perfectly frank with the court. It is fundamental that contempt proceedings, being quasi criminal, the complaining affidavit is in the nature of an indictment and the defendant cannot be tried for anything not specifically charged against him.

In re Reese, 107 F. 942, 947-948.

This elementary rule was recognized by all parties at the trial, as is evidenced by the following colloquy which occurred at its close:

“Mr. Wood: I am gonig to urge, irrespective of any testimony the court allowed to come in for illustration, they (the plaintiff) are bound by the allegations of the complaint.

“Mr. Treadwell: We will not dispute that.

“Court: That will not be disputed.”

Yet the court, when it came to writing his opinion and making his decree, ignored the rule thus expressly recognized, and agreed to by all the parties to this case.

**HANLEY'S RIGHTS TO THE 31 DAM
WERE NOT INVOLVED IN THE ORIGINAL DECREE AND HAVE NEVER BEEN ADJUDICATED.**

At the time of the original suit and decree Charles Altschul was the owner of Section 31. Hanley had the section under lease from Altschul and was irrigating it from the 31 Dam. Altschul was not a party to the suit and his rights were in no way affected by the decree that was entered. Some time after the decree was entered C. E. S. Wood obtained a contract of sale for Section 31 and turned the section in to the William Hanley Company, a corporation which was formed to take over not only the original Hanley lands but several other tracts, which, like this Section 31, never did belong to Hanley. The William Hanley Company therefore succeeded, by purchase, to all the rights of Charles Altschul in Section 31, and since Charles Altschul was not a party to the decree and was in no way bound by it, the William Hanley Company, as his successor, stands in the same position.

Charles Altschul has never had his day in court on the question of these water rights or this 31 Dam. They may be valuable or they may not be, but at any rate he is entitled to have his day in

court to have them determined, and the William Hanley Company, standing in his shoes, is likewise entitled to its day in court on these rights, and cannot be forced to litigate them in a summary contempt proceeding like this.

This proposition that Altschul was not a party and therefore not bound, and that the William Hanley Company has succeeded to his rights, and is therefore not bound, seems too clear to argue. You cannot argue an axiom. When you have stated it you have said all that is necessary. In view of Judge Wolverton's adverse ruling, however, we shall have to make a few suggestions.

In the first place we call attention to Judge Bellinger's opinion in a previous contempt proceeding between these same parties (record, pp. 321 to 330). The facts on which that opinion was based were these: After the entry of the original decree Hanley bought what was known as the Fennimore Place on the east fork of the river, and for the purposes of irrigating it put a new dam in the river a short distance above the old Fennimore Dam, which had decayed. The Pacific Live Stock Company, adopting the same attitude as it has in this present case, contended that, as the decree limited Hanley to the 21 Dam on his Bell-A Ranch and enjoined him from otherwise obstructing the river, his obstruction by means of the new Fennimore Dam which he had built, was a contempt. Judge Bellinger apparently thought this not worth discussion, for he dismissed it with only these words:

“The Fennimore interest was not involved in the suit in which the decree was entered, and the rightfulness of this check-gate was not adjudicated. Hanley’s act, therefore, in putting in this check-gate is not a matter for which he can be required to answer in this proceeding.”

This rule, it seems to us, became the law of the case. Judge Wolverton, however, has disregarded it entirely. His opinion is silent on it. But, if we correctly understood his position at the trial, he would differentiate the Fennimore Dam from the 31 Dam because, as he holds, the 31 Dam was mentioned in the decree and its uses were strictly limited by the decree to Luig’s land. He also apparently makes a distinction because of the fact that Hanley, though leasing Section 31 at the time the original suit was started, did not set up, in his answer, a claim to this dam. Now, first, as to the claim that the decree limits the use of the 31 Dam to Luig. Judge Wolverton, in his opinion, says (record, p. 52) :

“The decree has specifically declared its (the 31 Dam) status and limited its use, and it can be used for no other purpose without a violation of the decree; and this would be so whether the attempted use was by a party to the suit or by a party not related thereto.”

Now the decree does not limit the use of the dam to the extent the court says. The decree only limits *Casper Luig’s* use of the dam and does not purport

to do any more. The bill of complaint says (p. 1114 of record No. 2036) "Casper Luig has one dam" and the decree says (p. 1175 of record No. 2036) "that the defendant Casper Luig may maintain his dam in the west fork of Silvies River, where the same is now constructed in Section 31, township 23 south, range 31 east, Willamette Meridian, from the 15th day of May to the 1st day of July each year, in the manner and form as the same is now maintained, and thereby may obstruct the flow of the water in said west fork of Silvies River during said period, and use the waters of the west fork of Silvies River so obstructed during said period for the purpose of irrigating and in sufficient quantity to irrigate the east half of the southwest quarter and lots 6 and 7 of Section 6, and the southeast quarter of the northwest quarter and lots 3, 4 and 5 of Section 6, all in township 24 south, range 31 east, Willamette Meridian; and may also use and enjoy so much of the waters of said west fork of Silvies River during all other times as may flow upon the said lands or any other thereof in the natural flow of the water of said river, without obstruction to the channel of said river, and the said defendant will not be required to remove the frame or skeleton of his dam at any season, but except during the period aforesaid shall keep said dam open and the channel of said river unobstructed thereby." And later on the decree in a general clause binds the various successors in interest of the parties (p. 1181 of record No. 2036).

It may be seen that the decree doesn't even attempt to limit the use of the 31 Dam as to anyone but Luig and his successors.

There is even a question whether the 31 Dam now attacked is the dam mentioned in the decree at all. There were two dams over on the west fork,—one the true Luig Dam, which watered their land in Section 6, and the other the Pete Stenger or 31 Dam, which Hanley took over from Pete Stenger when he leased Section 31, and which is the true 31 Dam and is the one now under consideration. Hanley operated this dam as lessee before the decree and when he put it in to replace the old Stenger Dam Luig helped in putting it in, and so gained an interest in it. This was about 1898 or 1899, but at any rate, whatever the date was, Luig first gained an interest in the 31 Dam at the time he and Hanley rebuilt it together. (Hanley's testimony, pp. 185-187, 222, 223.) We merely mention these two dams thus in passing to suggest that the 31 Dam now under consideration may have never even been mentioned in the decree, it being possible that when the decree mentions Luig's Dam it means his own separate dam and not the one in which he was interested with Hanley.

The trial court says, in the course of his opinion (record, p. 51) :

“In the light of this testimony it is difficult to believe that Mr. Hanley ever acquired any interest in this dam” (the 31 Dam).

He adds that even if Mr. Hanley did have an interest in it he nevertheless violated the decree in using the dam. His opinion, therefore, that Mr. Hanley never acquired an interest in the dam is perhaps not important, since he does not base his decision on that fact. Nevertheless, we prefer to make a short comment on this finding by the trial court, for it is made against the positive sworn detailed statement of Mr. Hanley (record, pp. 185-187, 222, 223, and Hanley's affidavit, pp. 33-34) and seems to be based largely on the testimony of Henry Luig (record, pp. 309, 313). Since so much importance is given to Luig's testimony that it is allowed to outweigh Mr. Hanley's we have this to say about it: Henry Luig is an ignorant old man, as a reading of his testimony will show, and is a foreigner, not fluent in English, and his testimony consists mostly of answering "Yes" and "No" to very leading questions by counsel for the Pacific Live Stock Company, and Luig himself declares in his testimony again and again that he knows nothing about the dam, that he was away in Washington when his brother and Mr. Hanley built it, and that his brother Casper handled all the business. (This latter fact that Casper Luig and not Henry, the present witness, was the man in control of the Luig affairs, is corroborated by complainant's own bill of complaint which names Casper Luig as a defendant and omits any reference to Henry whatever). Furthermore, Luig admits at the end of his testimony that the old original dam

was put in by Pete Stenger and that Hanley succeeded Pete Stenger in the lease. For the convenience of the court we set out here Luig's testimony and ask whether it should be allowed to outweigh Mr. Hanley's testimony and form the basis for a finding that Hanley never acquired any interest in the 31 Dam at all.

"Mr. Luig, you and your brother Caspar put the first dam in there, did you not, in Section 31?

A. Oh, no. *Sam* Voegtly.

Q. Voegtly owned your place before you got it?

A. Yes, he had a section.

Q. When did Voegtly put it in there?

A. In 1886. *Henry* Voegtly put that dam in in 1886."

(It will be noticed that before he said *Sam* Voegtly.)

"Q. When did you get it—you and your brother?

A. I can't tell you exactly.

Q. About when?

A. He proved up on the land, and then he sold it.

Q. He proved up on the ranch and sold it to you?

A. Yes.

Q. Do you know how long ago?

A. I think it took three years.

Q. Two or three years after 1886?

Mr. Webster: He says it took three years to prove up on it.

Q. You and your brother, until your brother's death, used the dam, did you, until that time?

A. Yes.

Q. Since your brother's death, you have used it every year, have you?

A. Yes. We have put a new dam in.

Q. When did you put the new one in, Mr. Luig?

A. I think in 1905 or 1906—something like that.

Q. When you put in the new dam, did you have any talk with Mr. Hanley at that time?

A. I don't know—I wasn't here—if the other brother put that dam in. I went to Washington. After I came back, the dam was there.

Q. Didn't you give any interest in it when you put in the new one, to Mr. Hanley?

A. I don't know.

Q. You don't know?

A. No.

Q. Well, when you built the first one, you didn't ask Mr. Hanley anything about it, did you?

A. No.

Q. You just went there and built it?

A. Yes.

Q. You didn't ask the Road Company anything about it, did you?

A. That is what the other brothers say. I don't know nothing about it.

Q. So far as you are concerned, you and your brother simply went there and built that dam, and didn't ask the Road Company anything about it, did you?

A. I believe somebody what owned it went at that time. I don't think they can leave it out. I was not here.

Q. Mr. Luig, you testified just the other day over in the proceeding before Mr. Corcoran, didn't you?

A. Yes.

Q. Didn't you testify then that Mr. Hanley never had anything to do with that dam until you put the new one in, in '4, '5 or '6?

A. Yes.

Q. That is right, isn't it?

A. Yes."

(This isn't even testimony, it is only impeachment. State v. Yee Gueng, 57 Ore. 509, 512-517.)

"Q. He never had anything to do with it before that time, is that right?

A. So then after other brother was living, he attended to the business. I don't attend to it.

Q. When you built that new dam, did you take Mr. Hanley in with you and have him help you build it?

A. I don't know. The other brother built it.

Q. Didn't you testify over before Mr. Corcoran, that when you built the new dam you allowed Hanley to help you build it, and gave him an interest in it? Didn't you so testify?

A. Hanley helped our—

Q. Hanley helped you rebuild it?

A. The other brother said he did.

Q. Weren't you right there when the dam was rebuilt?

A. No, I was in Washington.

Q. How long did you stay in Washington?

A. Oh, when I come back the dam was built.

Q. When did you first learn that Mr. Hanley had got an interest in it?

A. That is what the other brother said.

Q. Your brother told you when you came back that he had given Mr. Hanley an interest in it?

A. Yes, that he paid half of the expense. If he done it, I don't know. I got nothing to show."

REDIRECT EXAMINATION.

"Q. That dam was first built by Peter Stenger, wasn't it?

A. It looked like it was there, before Sam Voegtly.

Q. Peter Stenger took a lease of Section 31 from the Road Company, didn't he?

A. Oh, yes, that is what they say.

Q. That is what you understood?

A. Yes.

Q. Hanley succeeded Peter Stenger in that lease, didn't he?

A. I believe he did.

Q. And Hanley has used that dam right along, hasn't he?

A. Most of the time, yes."

This is the testimony which is allowed to outweigh Mr. Hanley's testimony and to lead the court to say that "in the light of this testimony it is difficult to believe that Mr. Hanley ever acquired any interest in this dam." Just consider that a moment. The man who built the dam, whose right to it was far older and better than Luig's, the man who simply let Luig in on it from a feeling of neighborly friendliness, is now declared never to have acquired any interest in it at all.

But as we view it, these things are relatively unimportant. Whether the 31 Dam is the one mentioned in the decree or not and whenever Mr. Hanley got his interest in it, the fact remains that the dam waters the Altschul land and uses the Altschul water rights, which were never involved in the decree, and Hanley, as the successor of Altschul, has a right to those water rights, and to make use of the 31 Dam to avail himself of those rights. The only possible theory on which he could be forbidden to use the 31 Dam would be the theory that the decree limited the use of the dam to Caspar Luig and his successors alone, and barred all the rest of the world, and this, as we have seen, the decree does

not do. If that view be taken of it—that Hanley has the 31 water rights but cannot use them by means of the 31 Dam, because that, as a specific structure, is decreed against and limited to Caspar Luig and his successors alone—then all that Mr. Hanley has to do is to go and build a new dam in the river just above it, which would be a futile and vain thing for the law to require him to do.

In making this part of the argument we do not wish for a moment to be understood as even hinting that Mr. Hanley's interest in that dam is in any way doubtful. As a matter of fact this dam was put in the river in the eighties by Pete Stenger, who had Section 31 under lease and Mr. Hanley immediately succeeded Pete Stenger in his lease, including the dam, about 1898 and continued so until the property was purchased by the William Hanley Company.

Now as to the contention that Mr. Hanley, if he was leasing this dam in 1898 as he says, should have set up his claim to it in his answer to the bill of complaint. His failure to do so seems to have been seized upon by the trial court as one reason for believing that he had no interest in it.

It must be remembered that all of Hanley's main interests were over on the east fork of the river. His Bell-A Ranch, his home and all the lands he owned were over there. He had no interests at that time on the west fork of the river, except his lease of Section 31 from Charles Altschul, which was, compared to his other holdings, a mere incident and

unimportant. All of these leases made by Charles Altschul of the Road Company lands were short term leases, and it is probable that Hanley's lease of 31 was of this character.

The bill of complaint did not charge Hanley with any use of this 31 Dam at all. Mr. Hanley says, in his affidavit (record, p. 44), that Section 31 was deliberately omitted from the complaint by the P. L. S. Company because it was not the complainant's policy to get into any quarrel with the Road Land people or Mr. Altschul. Whatever be the cause, the bill did omit any mention of Section 31 or of Hanley's use of the 31 Dam, and centered its attack on Mr. Hanley's rights and directed his attention solely to his rights on the east fork of the river, which were, both in the complainant's mind and Mr. Hanley's, the important thing between them.

The language of the bill is as follows. After setting up the complainant's alleged right, it says (p. 1113 of record No. 2036) :

"But notwithstanding your orator's said rights, the defendants have wrongfully entered upon the channels of said river and the channels of its said forks above said lands of your orator, or some of them, and have wrongfully constructed and are now wrongfully maintaining divers dams in said channels and ditches leading therefrom; that is to say," (here the bill sets out the dams owned by other defend-

ants) "William D. Hanley has one dam and three ditches leading therefrom."

This clearly indicated Mr. Hanley's dam in Section 21, on the east fork of the river, with its ditches. That is what it was intended by the complainant to indicate, that is what Hanley conceived it to indicate, and it is what it did indicate.

But now, say counsel for the P. L. S. Company, although the bill did not charge Hanley with the 31 Dam, it did call on him to make a full disclosure of all his rights on the river, and having failed in his answer to disclose his claim to the 31 Dam, he is forever barred. Let us examine this contention. Leaving out of consideration now for the moment the fact that the William Hanley Company has acquired the new and independent Altschul rights, which Hanley didn't have at the time of the original suit, and therefore couldn't set up, let us look at the case as if William Hanley, an individual, still held Section 31 under lease, just as he did at the time of the original bill. Counsel say he was called on to make a full disclosure of all his rights. We say that he was called on to make a disclosure only as to those rights which he is alleged in the bill to be claiming, namely, the rights on the east fork. The paragraph of the bill calling for a disclosure is as follows (p. 1116, record 2036) :

"For as much as your orator can have no adequate relief except in a court of equity and to the end that the defendants may, if they can,

show why your orator should not have the relief hereby prayed, your orator asks that they may each be compelled to make answer to this, its bill of complaint, and to make a full disclosure and discovery in regard to the rights or pretended rights, if any they have, for diverting the waters from your orator's said land and obstructing its flow therein, *as is hereinabove charged*, and that they may each, according to the best and utmost of their knowledge, remembrance, information and belief, make full, true, direct and perfect answer to the matters *hereinabove stated and charged*, but not under oath, an answer under oath being hereby expressly waived."

The bill then prays for a general injunction restraining the defendants from diverting any of the waters from the river or either of the forks thereof. Our contention is that plaintiff must make his own case. He cannot call upon the defendant to make it for him, and that when the bill charged Hanley only with the dam and the ditches on the east fork of the river, and then asked for a full answer and disclosure as to the defendant's rights to divert the waters of the river from complainant's lands "*as is hereinabove charged*" and asked for a full answer to the matters "*hereinabove stated and charged*," it asked Hanley for an answer as to his rights on the east fork of the river only, and when he did answer fully as to those rights he performed his

duty fully and did all that was required of him. The affirmative part of Mr. Hanley's answer will be found on pages 4 to 13 of the record, and an examination of it will show that he answered most fully and in detail as to this dam and ditches on the east fork which are mentioned in the bill of complaint. So much for this so-called neglect of Hanley's to set up his leasehold rights on Section 31.

Aside from this controversy over the bill and answer which has just been discussed, the complainant's theory is that the decree allowed Hanley certain specific named rights, and except for those rights enjoined him and his successors forever from otherwise diverting the waters of the river. So that it makes no difference if he has acquired a new right from Altschul. Whatever right Altschul may have had he (Hanley) can't get it because he is prevented by the personal decree against him, and when Altschul's right passes to Hanley, Altschul's right becomes tainted with Hanley's limitations under the decree and Hanley cannot use it. This, it seems to us, is a false conception of what was accomplished by the decree. The bill of complaint was brought to determine certain water rights claimed by the various defendants for use on certain named lands and was really a bill to determine the water rights appurtenant to those lands. So that although the decree does perpetually enjoin the defendants and their successors in interest from diverting any of the waters of Silvies River, except

as in the decree allowed, it means that for the irrigation of those lands named in the decree they can use water only as allowed by the decree, but it surely does not mean that each one of those defendants is forever barred for the rest of his natural life from going out and acquiring, by purchase or otherwise, other water rights on Silvies River which were not involved in the decree.

It is true this decree personally enjoins the defendants, and a literal interpretation of its language might sustain complainant's contention, but let us look at the reason for decrees in equity being in this form and how far the form can govern in this case. Historically the equity courts have enforced their decrees in such a way that it is now generally stated that equity acts in personam, i. e., it imposes upon the party before it the duty to do or refrain from doing a particular thing. But this peculiar characteristic of equity is due rather to the form in which equitable remedies are administered than to anything in the primary substantive equitable rights. Acting in personam is peculiar to the remedial side of the equity court and not to the rights which equity courts recognize, create and enforce. When a court of equity summons before it numerous persons having rights in a certain stream and proceeds to adjudicate the relative rights of these parties, it first of all must adjudicate the validity and priority of the several claims and then proceed to enforce its decree in the characteristic equitable way, viz.: by injunction acting in

personam. But the injunctive part of the decree is only incidental to the establishment of the final water rights adjudged by the court. The injunction is but a way of enforcing the principal decree. This is the only theory upon which successors in interest could be bound by an equity decree to which they were never parties. The decree is *res adjudicata* as to them, not because they were parties to the suit, but because the decree does settle certain property rights.

If, then, a decree does settle property rights and grants injunctions to enforce its adjudication, then the force of the injunction should be no broader than the adjudication of rights contained in the decree. In other words, if the water rights of Section 31 were never adjudicated, then the injunctive portion of the decree ought not to be held to adjudicate them now by making the terms of the injunction effective against Mr. Hanley, as the present owner of Section 31. (See Pomeroy Equity Jurisprudence, 3rd Ed., Secs. 134, 135 and 170.)

In closing this part of the discussion of the 31 Dam we refer to the case of Josslyn vs. Daly, 15 Ida. 137, 96 Pac. 568. This case is right in point, especially in regard to the contention that Mr. Hanley cannot set up the Altschul right because he was lessee of that right when the suit was brought and should have set it up then. The case was as follows: In a previous case (Daly vs. Josslyn, 7 Ida. 657, 65 Pac. 442) Daly and Josslyn had litigated their rights to the waters of Seaman's

Creek. In that early case Josslyn had rested his claims for water entirely on his ownership of the "Kimbrough Ranch"; and although at that very time he had the "Galbraith Ranch" leased, he did not set up the water rights which he had as such lessee. Some time after that he bought the "Galbraith Ranch," thus changing his position, just as Hanley did, from lessee to absolute owner.

In the subsequent case of *Josslyn vs. Daly*, 15 Ida. 137, 96 Pac. 568, the parties were again litigating their water rights, and Josslyn set up the rights appurtenant to the "Galbraith Ranch" which he had purchased. It was contended that he could not do this; that he was bound by the judgment in the former case, and that having had the Galbraith place under lease at the time of the first case, and having failed to set up those rights in that case, when he had the opportunity to do so, he could not do it now. The court ruled against this contention, saying:

"It may be that Josslyn, having been a party to the case of *Daly vs. Josslyn*, would be bound as the tenant in possession of the Galbraith Ranch by the judgment entered in that case, and it is possible that during his tenancy he would not have been permitted as tenant to have raised this question, or have further litigated any rights he might have had either individually or as tenant of the Galbraith Ranch; but the title and possession that Josslyn now

holds is not as tenant, but as owner of the fee. He has acquired his title from a total stranger to the action of *Daly vs. Josslyn* and certainly cannot be precluded by that judgment from litigating any water rights that might have been appurtenant to the lands he subsequently purchased." (96 Pac., p. 571, first column.)

Even if Hanley was personally bound as an individual in regard to the 31 dam, the William Hanley Company would not be.

We are perfectly well aware that an individual will not be allowed to avoid the effect of a decree against him personally, by incorporating his property into a corporation and doing, as a corporation, what he could not do as an individual. We do not dispute that for a minute. We do wish, however, to point out to the court that the William Hanley Company is not William Hanley alone. It does include all of the lands which he held as an individual at the time of the decree, but it does include also the substantial interest of other people. For example, Mr. C. E. S. Wood conveyed to the William Hanley Company this very Section 31 now in dispute, and several other large and valuable tracts, in return for an interest in the corporation. If Mr. Wood, after obtaining the contract of sale of this section from Mr. Altschul, had taken the deed in his own name and become its owner instead of having it deeded to the William Hanley Company in return for stock in the William Hanley

Company, there can be no question that Mr. Wood would have had the right to water this riparian section from Silvies River independent of any decree. Is he then to lose this right because he has changed the form of this ownership from an outright ownership of the land to an ownership in a corporation which holds the land? In other words, is the William Hanley Company unable to buy a piece of land with its accompanying water rights merely because William Hanley, as an individual, had a lease on that land at the time of the original decree?

Often in this brief we have spoken of "Hanley" succeeding to the Altschul rights or of "Hanley's" ownership of 31. We have done so merely as a convenient way of speaking, but we do not wish the distinction between William Hanley and the William Hanley Company, a corporation, to be lost sight of for a moment. It is the William Hanley Company which, through Mr. Wood's contract of sale with Mr. Altschul, succeeded to the Altschul lands (record, p. 187). For convenience, too, we have sometimes spoken of the title to these road lands as being in Charles Altschul when strictly it was sometimes in the Willamette Valley & Cascade Mountain Wagon Road Company. They were really one and the same and it is shorter just to refer to the Altschul title.

The court's ruling in regard to the 31 dam is an attempt to adjudicate important property rights in a summary contempt proceeding.

It is well settled that contempt proceedings cannot be used to litigate important property rights. This rule was violated in this present case, and no better example can be found than this present case of the wrong that is done by attempting to adjudicate property rights in this way. Mr. Hanley was served with the complaining affidavit and order to show cause on the 29th of April, 1915 (record, p. 28). He was cited to appear on May 7th. He was in Portland when served and immediately had to go out to Harney Valley both to attend to some important matters regarding his cattle and to gather his witnesses and prepare for the hearing on May 7th. Not knowing whether he would be able to get back from Harney by May 7th his counsel, Mr. C. E. S. Wood, hurriedly prepared the affidavit which will be found on pages 29 to 46 of the record, and Mr. Hanley signed it and rushed off to Harney so as to try and get back in time for the hearing on May 7th. There was no time for either him or his counsel to look into these matters and prepare their case with the care which these important water rights demanded. The William Hanley Company's principal and oldest right on the west fork of the river was rushed into court and summarily tried eight days after the matter was first brought to the company's attention. The whole thing was done summarily in a hurry and the result

was that there were mistakes in Mr. Hanley's affidavit and in the testimony. There was no time to look up witnesses and records of past years. The old 31 Dam was put in in the eighties by Pete Stenger and a proper presentation of the case would have required finding witnesses who could go back to that time and trace the use of the dam up to the time Mr. Hanley got it and corroborate Mr. Hanley's testimony as to about the date when he succeeded Stenger in the lease and rebuilt the dam, and as to how Caspar Luig got an interest in it, and what water was diverted from it and where it went; a proper presentation would also have required a showing of the stock books of the William Hanley Company to show that that company is not simply William Hanley, incorporated, but includes other important interests. All of these things and many others were exceedingly important, and yet this case was tried without any adequate opportunity to go into them and substantiate them at all, with the result that the trial court has actually found that Mr. Hanley never had any interest in this dam at all.

Authorities on the rule that contempt proceedings are not appropriate to try property rights are:

In re Paschall, 10 Wall. 483, 492.

Ex parte Hollis, 59 Cal. 405, 413.

Baldwin v. Hosmer, 101 Mich. 119; 59 N. W. 432, 437, 2nd column.

SECTION 5

In the foregoing discussion of the 31 Dam we have referred principally to it as watering Section 31 because that was sufficient for the purposes of the argument, but we wish to point out that Section 5, cornering with Section 31 on the southeast, is in the same category as 31; that is to say, that Section 5 is also dependent on the 31 dam for irrigation (record, pp. 226, 227) and, like 31, was owned by Charles Altschul at the time of the decree and was subsequently purchased from Charles Altschul by the William Hanley Company through the medium of Mr. C. E. S. Wood (record, p. 237), as has been previously explained. The only difference between the two sections is that 31 lies right on the river and Section 5 does not, and Section 31 was under lease to William Hanley at the time of the decree and Section 5 was not.

THE YOUNG DAM

This dam is known as the Young Dam, but in reality Young has no interest in it and it is really the sole property of the William Hanley Company.

Our contention in regard to this is very much the same as in regard to the 31 Dam and will be repeated here only to the extent the difference in the facts warrants. The facts in regard to this dam are as follows: The defendant Young was, by the decree, allowed a dam in the west fork of the river for the irrigation of his land in the northeast quarter of section 30, township 23 south, range 31 east.

This old dam was nearly a quarter of a mile south of the north line of the section. This dam having washed out, Young and Hanley together built a new dam about a quarter of a mile further up the river just north of the section line between 19 and 30, Section 19 adjoining Section 30 on the north, and the dam being just barely in Section 19. The idea appears to have been that Young would use this dam in place of his old one, and the William Hanley Company would use it for the irrigation of Section 29, and also for the irrigation of Section 19, which was owned by the Harney Valley Improvement Company, a corporation in which Mr. Hanley, Mr. C. E. S. Wood and Mr. D. C. O'Reilly, of Portland, are the principal stockholders. The Pacific Live Stock Company brought a contempt proceeding against Young on account of his use of this dam and Judge Bean held him in contempt. (See Judge Bean's opinion, record, pp. 330-338.) After this Young ceased using any water from this dam whatever and turned all interest in it over to the William Hanley Company, which has used it for the irrigation of Sections 29 and 19, both of which were Altschul sections and not involved in the original decree (except that Section 19 was under lease to H. C. Levens at the time of the original decree, and he was given a right to water it as long as his lease continued).

The gist of the charge against Hanley regarding this dam is found in paragraph II of the complaining affidavit (record, pp. 18-19), and is that

Young, Hotchkiss and Thornburg built this dam and in April, 1915, diverted water from the river by its means, and that Hanley advised, encouraged and assisted them in these acts.

This charge against Hanley was not proved; in fact, the direct contrary was proved; but Mr. Hanley, again, in order to be quite frank with the court, stated openly that the William Hanley Company claimed the ownership of the dam for the irrigation of Section 29 and the Harney Valley Improvement Company's Section 19. It appeared very plainly at the trial, however, that although the William Hanley Company claimed the right to use this dam, it had not as a matter of fact used it this year at all. (Record, pp. 35, 188, 192, 236-237.) This is, to a certain extent, corroborated by Mr. Treadwell (record, p. 154), who says that when he visited the dam on the 25th of April no water was going out on the east side, which is the side it would have had to go out on to reach Section 29.

On this state of the record Judge Wolverton said that Hanley "violates the decree when he attempts to use any (water) by virtue of the Young Dam, whether old or new" (record, p. 59), and the trial court in his decree (record, p. 79) enjoined Hanley from using it.

We contend that this was erroneous for the following reasons:

1. It was going beyond the issues made by the complaining affidavit. That charged Hanley with

one thing only in regard to this dam, namely, that he assisted, advised and encouraged Young, Hotchkiss and Thornburg in their use of it in violation of the decree. This was the only charge made against Hanley and consequently the only thing for which the court could hold him in contempt. The proof failed utterly on this and there the court should have dropped it. Instead the court went entirely outside the issues made by the complaining affidavit and decided that Hanley had no right to use this dam, and forever enjoined him from using it.

2. This was adjudicating important property rights in a contempt proceeding, the error of which we have previously discussed.

3. The dam (though not used at all by Hanley that year) was for the purpose of irrigating Section 29, belonging to the William Hanley Company, and Section 19, belonging to the Harney Valley Improvement Company, neither of which sections were ever involved in the original suit. Both were Altschul sections and both were acquired after the decree.

We should say in passing that Mr. Hanley had no interest, leasehold or otherwise, in these sections at the time of the original decree and consequently the argument made against him in regard to Section 31, viz., that he should have set up his claim when he made his answer in the original suit, does not apply here.

The trial court's opinion seems to assume that Hanley is here claiming a right under or through Young. The opinion says (record, p. 58) :

“Hanley could acquire no better or superior right or interest in that dam by purchase from Young than Young had primarily. And as to the claim of Hanley that he helped to construct the dam, he could acquire no right to the use of the waters thereby for the reason that the dam was treated of by the decree. Young, Hotchkiss and Voegtly were permitted to maintain one dam at or near the locality where the old dam was located at the time of the entry of the decree, which dam, when open, should not unnecessarily obstruct the flow of the water in the stream. And the fact that Hanley assisted in the construction of the new dam could give him no greater rights than the original parties had to the use of the old dam. Furthermore, Hanley was a party to the original suit and he is bound, as in the case of the Luig dam, by the terms of the decree respecting the particular dam. Judge Bean, in the Young contempt proceeding, has held that Hanley should get none of any surplus water there might remain over Young's use; and he certainly has none that the decree gives him; so he violates the decree when he attempts to use any by virtue of the Young Dam, whether old or new.”

Now this is a complete misapprehension of Hanley's position. He does not claim the right to use any of Young's surplus water, nor does he claim anything by or under or through Young because of his purchase of this Young Dam. His claim is not based on Young's rights at all. It is simply this: That the William Hanley Company, as the successor to the Altschul rights, has a right to build a dam in the river for the irrigation of Sections 29 and 19 regardless of the decree. And the fact that the company, for mutual convenience, joined with Young in the construction of this dam makes no difference whatever in the company's rights. Young's dam permitted by the decree had washed out and he wanted to put in a new one. The William Hanley Company wanted to put in a dam at about the same time, so they joined together. That is all there is to it. It is precisely the same as if the William Hanley Company had built this dam entirely independently of Young. In fact that *is* the position now, for the company owns the dam independently of Young and the trial court has declared that *this dam* is not the Young Dam permitted by the decree at all, and that if Young wants to maintain a dam he must go down the river one-quarter of a mile to the old place and rebuild his dam there. (Record, pp. 72, 78.) This dam, therefore, of the William Hanley Company's on the south line of Section 19 is not the dam treated of by the decree at all. It is a new structure, built and owned by the William Hanley Company, for the irriga-

tion of land and the use of water rights not adjudicated in the decree. These water rights may be found, after a judicial investigation, to be worthless. They may be so late in time as to be not worth a dollar, but at any rate the William Hanley Company is entitled to have them judicially investigated, and the Pacific Live Stock Company, if it wishes to contest them, should bring a separate, independent suit where these rights can be tried out in the way which their importance demands, and not be summarily disposed of, on eight days' notice, in a contempt proceeding.

There was a good deal of testimony at the trial describing the structure of the Young Dam, and how much the water in the river was raised by means of the permanent board which is nailed across its bottom, and also whether the water was raised more by this dam than by the old Young Dam a quarter of a mile down the river. In preparing the record on appeal, eliminating immaterial parts as Equity Rule 75 requires, we have left all of this out, for we do not regard it as of any importance. In the view we take of the case, namely, that the William Hanley Company is claiming a new and independent right not in any way dependent on the old Young Dam, it would make no difference whether this William Hanley Company dam raised the water in the river six inches or six feet, or blocked up the river altogether. It might not have a right to do this, but the Pacific Live Stock Company, in order to show that it had no such right,

would have to bring an independent bill just as it would against any stranger to the decree. For these reasons we have omitted the testimony referred to.

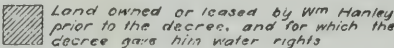
THE EAST FORK OF THE RIVER

The charges made in paragraphs III and IV of the complaining affidavit against Hanley were not sustained by the trial court. Indeed there was no evidence at all to sustain them and there was a great deal of evidence to the contrary. We therefore pass these by and come to the remaining charges, which all relate to the east fork of the river. The first of these charges relates to the drain ditch, the second to the 21 Dam and the next to the alleged diversions of water by means of so-called "cuts" in the river bank. We believe it will be conducive to a clearer understanding if we reverse this order and discuss the cuts first; then the drain ditch and next the 21 Dam. Before entering on this discussion, however, we wish to state that all of these alleged violations of the decree on the east fork were trivial, even if true. We think that this court will agree with that statement after it has read the evidence. And indeed this fact is practically admitted by Mr. Treadwell to be true, for he says that he had intended to overlook these matters on the east fork, and it was not until his ire was aroused by Mr. Hanley's use of the 31 Dam on the west fork, and his supposed other activities

there, that Mr. Treadwell decided to bring this contempt proceeding. His exact statement is:

“In fact, I said to Judge Webster, in addition to what I have said—I told him that I felt a little reluctance about this matter of taking any proceeding on that matter at that time, on account of the fact that I was Mr. Hanley’s guest when I was down there (on the east fork); and it was not until these other matters came up on the other fork, that could not be overlooked, that this proceeding was brought.” (Record, pp. 152-153.)

Coming now more specifically to the questions of the “cuts” and drain ditch, it is absolutely vital to a correct understanding of the issues involved, to have a clear picture before the court’s mind of the topography of the country at that point, and we therefore state it in some detail. The following sketch will give a fair idea of the course of the river through the sections and of the location of the drain ditch and of the Orphan Headgate and levee, and the position of the various “cuts,” as said position is stated in the complaining affidavit and Mr. Griffin’s testimony.



It is important to remember that the river, through Section 27, as we pointed out in our opening statement, has banks higher than the surrounding country and that it narrows very markedly as it proceeds southeasterly through Section 27, and in Sections 34 and 35, immediately south and southeasterly of Section 27, the channel becomes so small and meandering and choked that it is practically no channel at all. Consequently the river here is something like a funnel with its small end in Sections 34 and 35, and as the water pours down into this funnel it is of necessity forced out over the banks in Sections 27, 34 and 35, and in the old days,

before anything was done to relieve it, made these sections a marsh. The river channel re-formed again further south and carried this water through the Pacific Live Stock Company's Island Ranch and into the Malheur Lake. It was to relieve this marshy condition of Sections 27 and 35 and convert them from tule beds into hay meadows that the Hanley Drain Ditch was built. This ditch, as will be noticed from the plat, has its headgate in the river in the northeast quarter of Section 27 and flows in a general southeasterly direction through Mr. Hanley's land for about one mile, where it then enters the Pacific Live Stock Company's land in Section 26. This ditch was built about 1893 by agreement between Mr. Hanley and the Pacific Live Stock Company, and its theory was that it would relieve the excessive flooding of Sections 27 and 35 by diverting a part of the river away from those sections and carry it southeasterly to the Embree Slough, through which slough the water would be returned to the re-formed channel of the river further south. Of course it was not the object of the ditch to divert all the water away from these sections, but only to regulate the flow of the river past the headgate of the drain ditch so that the water which passed on would overflow these sections enough to give them natural irrigation and make them produce hay, but would not flood them into a marshy condition and make them produce tules. In a sense, therefore, the ditch is a very important part of the irrigation system of Section 35. One

might say it irrigates Section 35, not by putting water on it, but by taking some of the water off it; and the same is true of Section 27, and we suppose used to be true as to Section 34, although the Pacific Live Stock Company has taken other means to prevent the flooding of 34. And in fact the Pacific Live Stock Company, although it agreed to the building of the Hanley Drain Ditch, never had any interest in it nor does it claim any, except in that part of the ditch which lies on its own land in Section 26. It does not claim any right, nor has it any, to regulate the flow of water through the headgate of the ditch. Hanley has the sole right to operate and use the ditch, subject only to the limitation of the decree that he shall use it only for the purpose of draining water from the surface of his land and shall not use it as an irrigation ditch.

Some time after the entry of the original decree Pete Clemens and P. G. Smith put a small headgate in the river in the northeast corner of Section 34 and thereby diverted water for stock purposes through a small ditch known as the Orphan Ditch. This ditch carried a little water over to the northwest quarter of Section 34 and Section 33. We believe there was some litigation between the Pacific Live Stock Company and these men over this, but at any rate whether it was to settle litigation or for some other reason, the Pacific Live Stock Company bought out these men and has continued to use this Orphan Headgate and ditch. The headgate became out of repair and washed out so that the

Orphan Ditch diverted much more water than it formerly did, and in a previous contempt case, Judge Bellinger ordered the Pacific Live Stock Company to repair this headgate and maintain it so as to conform to the requirements of the decree. (Record, p. 330.) Notwithstanding this, the Pacific Live Stock Company in the Fall of 1914 put in a new headgate at this point much larger than the old one, and enlarged the Orphan Ditch throughout, placing all the dirt from the excavation on the south side of the ditch, so that this south bank of the ditch forms in effect a great levee, which holds the flood waters back on Section 27 and prevents their flooding Section 34. According to Mr. Gilcrest, superintendent of the Pacific Live Stock Company, the ditch and levee perform the double purpose of preventing the flood water from running off 27 onto 34, and of carrying this flood water and the water diverted through the Orphan Headgate, westerly onto Section 33 for irrigation purposes. (Record, p. 171.)

The general slope of the country is here southeast, so that the ditch, running due west, is against the grade of the country, and it is Mr. Hanley's contention that in order for the Pacific Live Stock Company to force the water through the ditch, it has, by means of its big levee, to back the water up over his Section 27 and cover the southern part of it with water, in some places two or three feet deep, which ruins it. Furthermore, that the natural flood which has perennially, and without any artificial assistance,

overflowed Section 27 and passed on should not now be held back and kept standing on Section 27. The Pacific Live Stock Company denies Mr. Hanley's contention that the Orphan Ditch backs the water up on him, and brings photographs and testimony to show that when the Orphan Headgate is opened to its full capacity the ditch will carry all the water without backing any up on 27, providing there is no water coming into the ditch off 27. But it appears that when water is coming off 27 and going into the ditch, filling it, then more water cannot be turned into the ditch from the headgate without causing the water to flow back onto 27. Or, looked at the other way, if water is flowing into the ditch from the headgate, filling it, the water from 27 cannot go into the ditch, and is held back, flooding 27. In other words, when the ditch is already full, with the water diverted from the Orphan Headgate, it is the same as if it was full of earth, or any other substance that obliterated it, and all there is left is the big levee along the left bank standing up above the plain. The situation is then the same as if there were no ditch at all, but simply a big levee, and whether it is the 27 water or the water from the headgate makes no difference. It is all intermingled and you can't tell. But in any event the levee backs the water back onto 27. Mr. Gilcrest testified that in enlarging the ditch and building the levee, in 1914, the intention was to make the ditch large enough to take care of the water from 27 (Gilcrest, p. 163). But, Mr. Griffin,

the engineer, admits there are times when the ditch won't do this (Griffin, p. 113), and the kodak picture which he took (complainant's exhibit, 23) certainly corroborates him.

With this prefatory statement of the conditions and the general topography on this fork of the river, we come now first to the question of the "cuts."

THE CUTS

The complaining affidavit charges (record, pp. 23 and 24) that by the terms of the decree the defendant William Hanley was enjoined from in any manner obstructing the channel of the Silvies River prior to the 5th of May each year, and was also enjoined from diverting any water therefrom, except as would naturally flow through the Upper Hanley Ditch, but that notwithstanding this the defendant Hanley during March and April, 1915, in willful contempt and violation of the decree, made the following diversions by means of cuts in the bank of the river on his land described in the decree, to wit:

"In the left bank of the east fork of Silvies River about nine hundred feet below the Hanley Drain Ditch, a cut in the bank of said river about twelve feet in width and three feet in depth, diverting about fifty second feet of water from said river; a cut in the left bank of said river about a thousand feet above the south line of Section 27, township 23 south, range 31 E., diverting about six second feet of water

of said river; besides the foregoing, the said defendant Hanley diverted a large quantity of water through numerous smaller cuts in said river through Section 27 and aided the diversion of water through the same, as well as the cuts aforementioned, in the following manner: The said channel of Silvies River through the said Section 27 and through Section 35 in the said township is small and sluggish and easily obstructed, and the said defendant Hanley, in willful violation and contempt of the terms of said decree, has, during the months of March and April, 1915, further obstructed the channel of said river by maintaining therein, on Section 27, the timbers of an old bridge, which has been destroyed, across the said river, and which timbers have been permitted to fall and lodge in the said river, and also by maintaining another bridge over the said river, the stringers of which are set into and below the banks of said river, and so that the same obstructs the flow of water of the said river, and the said defendant also permits to accumulate in the channel of said river and to be caught by said bridges and timbers, the carcasses of dead cattle and hogs and also other material which has obstructed the channel of the said river and prevented the water thereof from flowing down the same, and which assisted it to flow over the bank and out of the low places along the banks of said river, and also through

the cuts in the bank aforesaid; and by means thereof the said defendant has diverted about seventy-five second feet of water from said river on the west side in addition to the water aforesaid, and all of said acts of the said defendant have been in willful violation of the terms of the said decree."

The trial court absolved Mr. Hanley from any blame on account of the old timbers of the bridge and the stringers of the new bridge, and the dead cattle and hogs, etc., because the evidence showed either that Mr. Hanley had had nothing to do with them or that they were negligible anyway, but the court did find Mr. Hanley in contempt for not keeping the "cuts" in the river bank closed, and inserted a paragraph in his decree requiring Mr. Hanley to keep them closed.

It was the contention of the Pacific Live Stock Company that these "cuts" had actually been made in the bank artificially by Mr. Hanley. It was Mr. Hanley's answer that these "cuts" were natural openings in the bank which had been made by the action of the water breaking out over a low depression and then cutting deeper until a gap was formed, and that these gaps or openings had been there forever and were a natural part of the river, and that while he was under no obligation to keep them closed, still he nevertheless tried to do so, and especially so this year, in order to avoid any complaint by the Pacific Live Stock Company, and that the spade marks and

new earth at these "cuts," which the Pacific Live Stock Company evidently concluded had been done in opening them up, was really done in an attempt to close them.

The trial court apparently adopted Mr. Hanley's contention that these "cuts" were natural breaks or openings, but nevertheless held him liable for not keeping them closed, saying, in his opinion (record, p. 70) :

"He should have kept these breaks and gaps in the banks of the stream closed, or at least in very large measure. The just implications of the decree require this of him, as he is only given the flood waters to May 5th, and water pouring through rents in the banks cannot be termed flood waters."

(In passing we point out that of course the court could not have meant by this that Hanley's right to flood waters ceased on May 5th. He means that up until May 5th the only water Hanley has a right to are the flood waters.)

The court's view that these "cuts" were not artificial but are natural in the river bank is fully sustained by the evidence. Mr. Griffin, who was the complainant's chief witness on these "cuts," is himself uncertain whether they were artificial cuts or natural breaks, and his only reason for supposing that they were artificial is that he saw evidences of shovel work about them. (Record, p. 136.) And this shovel work was only at the largest ones. (Rec-

ord, p. 137.) And he admits that the whole river bank is "wavy" or indented with numerous natural depressions. (Record, p. 137.)

Mr. Treadwell, in driving down the river bank with Mr. Hanley, says he wasn't close enough to these "cuts" to notice any spade marks. (Record, pp. 150, 191.) And while Mr. Gilcrest is of the opinion that these depressions or openings in the bank are not as the bank was originally, it is worth pointing out that Mr. Gilcrest was not in the country in the early days (record, p. 175) and can hardly therefore be in a position to state how the river bank was originally. Even Mr. Gilcrest admits that the river bank is indented, and in flood times the water gets its relief from the safety valves or natural depressions in the bank, so that in flood times parts of the banks are under the water and parts are out of the water. (Record, p. 170.)

Mr. Newman, the foreman of the Pacific Live Stock Company's Island Ranch, says that the river has always been accustomed to overflow on Mr. Hanley's Section 27 (record, p. 183), and that the river bank is more or less indented (record, p. 184).

Mr. Hanley testified emphatically that no "cuts" had ever been made in the bank by him, his men or anybody else. (Record, pp. 201 and 208.) That these "cuts" were original with the country and were there when he first came to the country. That he cut hay on Section 27 in 1882 and 1883. (Record,

p. 208.) That the "cuts" are made by the water (record, p. 201), and there are more of them on the east bank than on the west bank because the country leans east. (Record, pp. 249-251.) That he doesn't want the cuts open because that lets the water run out through the low places, whereas his aim is to keep them closed so that the water will work out evenly over the top of the bank, and thus irrigate the land thoroughly and evenly. (Record, p. 204.) That he had a man working along the river here with special instructions to keep the "cuts" closed (record, p. 200), and he is especially sure about these instructions he gave because it was part of his general policy of conciliation toward the Pacific Live Stock Company this year to keep them closed. (Record, p. 202.) That the permanent method of filling the "cuts" is to haul dirt in with scrapers (record, p. 250), but if they wash out during the flood season, then they are temporarily repaired with stakes and boards and manure, which will hold at times when earth thrown in there would immediately wash out. (Record, pp. 249, 250.) That the photograph, Complainant's Exhibit 15, is not typical but only shows a cut closed by an emergency method. (Record, p. 250.)

George McLaren testified that he had been in Harney Valley twenty years and that the special work he did on the Hanley Ranch was the handling of the water. (Record, pp. 271, 272.) That Hanley has never cut gaps in the river (record, p. 277), and that his (McLaren's) job in regard to these river

banks has been to keep them in repair, and that every Fall he went around with his men and scrapers and fixed any places in the bank that were wearing out, or any breaks that had come in during freshets and had been fixed only temporarily; that he would make them as permanent as possible and would rebuild levees. (Record, p. 277.) Referring to some testimony of Mr. Griffin to the effect that he (McLaren) had stated to Griffin that these cuts formed a part of the Hanley irrigation system, Mr. McLaren explained that he had had reference to the cuts in the ditch bank on which he and Griffin were then standing — the Hanley Upper Ditch. (Record, p. 277.)

John Ryan testified that he had been in Harney Valley three years and was at present working for Mr. Hanley, and that during the Spring of 1915 his job has been looking after the water from north of 27 down to the Fennimore place and keeping the breaks in the river bank closed. (Record, p. 284.) That earlier in the season he had been working over on Section 5 and still had work there to do, but that about the third or fourth of April he was ordered by Mr. Hanley to leave the work over there and come over on the east fork of the river and close the breaks immediately (record, p. 295), and that these orders came direct from Mr. Hanley himself. (Record, p. 287.) That he fixed the "cuts" where the water was high, by putting poles across them and driving boards down into the ground with the

upper end of the board resting against the poles, and took a sled and team and hauled the old wet bottom of a hay stack and dumped it in against the boards (record, pp. 286, 287), and that this is a temporary method adopted during flood time, because it is the only way that you can make any dam or levee stick in a cut while the water is running through it. That to fill it with new earth is useless, for the water immediately cuts it out. (Record, pp. 286, 287 and 293.) That in the whole length of the river he has never seen any "cuts" that were made artificially, and wherever a "cut" has appeared it has been closed up some way or other (record, p. 288), and that the boards driven into the cuts are, as he has said before, to stop the water temporarily and are not meant to regulate the water by putting them in and taking them out (record, p. 293) and are not part of the irrigation system (record, p. 294), and that he hasn't had any of them out this summer, but on the contrary has been putting them in and putting stuff in with them to stop the water. (Record, pp. 294, 295.)

Will McLaren, a son of George McLaren, has been in Harney Valley eighteen years and has worked for Mr. Hanley a great part of the time and never got any orders to make cuts in the river banks and never did. (Record, p. 297.)

Dave McLaren, another son of George McLaren, has been in Harney Valley fifteen years and has worked for Mr. Hanley, some of his work being

in regard to irrigation, but not very much of it. He has never made any cuts in the river bank. (Record, p. 300.) He did help repair one "cut" about the middle of Section 27 on the east bank of the river. It looked as if it had washed out there, and was a place ten to fifteen feet wide, and they plowed a lot of sod and carried it on a sled to the cut, and made an embankment there about five feet wide. (Record, p. 301.)

This is all of the testimony in this present proceeding in regard to these "cuts," and it is certainly enough to show that they are made entirely by the action of the water, and the river bank has always had them in it; but if further corroboration is needed, it may be found in the testimony of Charles Cronin given in the original suit, the original transcript of which testimony is now in this court. Mr. Cronin was foreman of the Pacific Live Stock Company's Island Ranch, and testifying for the company, said (pp. 174 and 175 of the original transcript) :

"Q. Do you know anything about a cut in the bank of the river about the northeast corner of 34-23-31?

A. Yes, sir.

Q. What do you know about that?

A. I know there is a waterway there.

Q. What is the effect of it?

A. It draws the water out of the river.

Q. Do you know whether it is artificial or otherwise?

A. I cannot say, *I think it is natural.*"

This natural cut of Mr. Cronin's in the north-east corner of Section 34, joining 27 on the south, is on that very stretch of the river where the cuts which we have been discussing are located.

On top of all this testimony surely no argument is necessary to show that these "cuts" are natural washes by the water and not made by the hand of man. The only reason, apparently, that any contrary idea ever arose in the minds of the Pacific Live Stock Company was that young Griffin, traveling up and down the river here on the Hanley property, saw the poles and stakes and boards which Hanley's men had put in as a temporary makeshift to stop the water, and jumped to the conclusion that they were a part of the regular irrigation system of the Hanley Ranch, and were there to be put in and taken out at pleasure, and so control the water like so many water gates. We doubt whether even the Pacific Live Stock Company, after the explanation of these cuts that has been made in this case, believes that they are anything else but natural. We feel that it is sufficient to point out, by way of argument, only two things in regard to them. First: That Mr. Hanley does not want the water flowing out through these "cuts" for the reason that they naturally occur in the lower part of the bank and he wants the water to work out evenly over the whole bank and irrigate the higher ground as well. Second: That it is perfectly inevitable that the water should break out and make

these "cuts." It is more than probable—it is inevitable; you can't get away from it. The snow melts in the mountains and comes down in great floods and pours down through the river channel until it begins to hit Section 27, where the channel gets narrower and narrower and more like a funnel, until it practically ends entirely in Sections 34 and 35. There is thus no place for the water to go unless it breaks over the banks. The Hanley Drain Ditch, when open, will take care of part of it, but not all. There is no question about the channel through Section 27 narrowing up like the small end of the funnel as we have described. The testimony is uncontradicted that it does, and in fact the affidavit of the complainant itself, on which this very contempt proceeding is based, says (record, p. 24) :

"The said channel of Silvies River, through the said Section 27 and through Section 35, in the said township, *is small and sluggish and easily obstructed.*"

And it then goes on to say that the channel is so small and easily obstructed that even the carcasses of dead cattle and hogs tend to block it.

Even the trial court, while holding Hanley in contempt for what he calls Hanley's "inexcusable and purposeful neglect to suitably repair the breaks in the banks of the east fork of the river" (record, p. 72), was nevertheless of the opinion that the breaks were natural, as the language of his opinion

which we have already quoted shows. (Record, p. 70.)

If then they are natural and are a part of the normal condition of the river bank and have been so from time immemorial, can Hanley be held in contempt for not keeping them in repair, and can he be ordered, as the decree in this contempt proceeding attempts to do, to keep them in repair as one of the requisites of his purgation of the contempt? It is true that Mr. Hanley wants to keep these breaks closed. He wants to do it for his own purposes, as above explained; but it is one thing to want to do a thing for your own purposes and without coercion, and it is quite another thing to be told that you *must* do it as a condition of purging yourself from contempt of court, with the necessary implication that if you ever fail to do it you will be jerked up again for further contempt of court and either fined or imprisoned.

Now the decree says nothing about these cuts or breaks. Judge Wolverton, however, was of the opinion that the "just implications of the decree" required Mr. Hanley to keep them closed "at least in very large measure." (Record, p. 70.) In this, we think, there was error.

The words of the decree regarding Mr. Hanley's use of the water, after providing for the dates between which he may use his 21 Dam and the circumstances under which he may use his drain ditch, are as follows (p. 1170-1171, record No. 2036) :

“If at any time and while the dam of the said W. D. Hanley is open so that it does not obstruct the flow of the water in said river *and from natural causes the waters of the said east fork of Silrics River shall overflow its banks upon the land of the said W. D. Hanley,* or naturally run through either of the ditches of the said W. D. Hanley leading from the dam of the said W. D. Hanley first above described, *said defendant W. D. Hanley shall have the use and enjoyment of so much of the said water of said river as may come upon his land in the manner aforesaid and during such times as the same may run thereon from natural causes and without any obstruction of the channel of said river.*”

Doesn't this give Hanley the right to use water that comes through these natural breaks in the river bank? When water pours through one of these breaks isn't it overflowing the river bank and running on Hanley's land from “*natural causes*”? It must be conceded that the breaks are natural; that the hand of man had nothing to do with them. The trial court's opinion certainly concedes this. Instead, therefore, of the “just implications of the decree” requiring Hanley to close these breaks, does not the decree expressly give him the right to any water that may flow through them? We repeat again the words of the decree—whenever “*from natural causes the waters of said east fork of Silrics River shall overflow its banks upon the land of the*

said W. D. Hanley * * * *and during such time as the same may run thereon from natural causes* and without any obstruction of the channel of said river" he may use the water. If water running through a gap in the bank, which the water itself has made, is not running on Hanley's land from a natural cause, then it is difficult to conceive what a natural cause could be. To sustain this contention, it isn't even necessary to avail ourselves of the fact that these breaks in the river bank have been there from the earliest times. If there had *never* been a break in the river until this year, and then one occurred, and the water ran out through it on Hanley's land, it would be running thereon from a natural cause and he would be entitled to it.

The trial court says in his opinion (record, p. 70) that Hanley must keep these breaks closed because up until May 5th he is only given the "flood waters" and "water pouring through rents in the banks cannot be termed flood waters." If by this the court meant that Hanley could only have the water when it was overflowing the river bank throughout its whole length—the high places as well as the low—then we cannot agree with him. In the first place rivers do not generally overflow their banks in that way. They generally overflow in the low places, leaving the higher parts of the bank exposed, and that is all these "cuts" are—the low places in the bank where the water, years gone by, has sought an outlet through a depression and cut it out.

There is certainly nothing in the words of the decree to justify the trial court's holding. The words are whenever the water "shall overflow" the banks from "natural causes" and during such time as the waters "run" on Hanley's land from "natural causes" he may have it. The low parts of the bank, these gaps or breaks along the bank, are as much a part of the river bank as the highest point along it, and whenever the water flows out through them Hanley may have it. There is no magic in the words "overflow its banks," which means that the water must overflow the bank throughout—high parts as well as low. And that there was no intention to give the words any such restricted meaning is shown by the fact that a few lines later the decree abandons the word "overflow" and says that Hanley may have the water during such time as the same may "run" on his land from natural causes. We insist that by the very words of the decree Hanley has a right to this water which overflows the river banks through the gaps, as well as that which overflows the higher parts of the banks. Why, how is Hanley to govern himself under any other interpretation? How is he to know what are flood waters and what are not? How is he to know how deep a depression must be before it loses its character of a simple depression, giving him the right to take the water that flows through it, and becomes a "cut," to take water from which would render him liable to contempt of court. The man is harassed with difficulties enough, trying to get along with the

Pacific Live Stock Company under this decree, without requiring him to try to live under any such unworkable interpretation of it. Judge Wolverton, himself, seems to have recognized the difficulty with his own ruling, for after saying that Hanley should keep the gaps closed, adds, "or at least in very large measure." (Record, p. 70.)

So much for the strict wording of this part of the decree. But now looking at the thing in a broader light. Looking at the purposes of the bill of complaint and the objects which it sought to accomplish, and looking at the circumstances under which the decree was made, it will be perfectly apparent that Mr. Hanley has a perfect right to leave every one of these cuts open if he wants to.

The whole theory of the bill of complaint was that the complainant was a riparian proprietor and had a right to have the river flow *as it was wont to flow*. The complainant was a lower riparian proprietor fighting diversions of water made above it on the river. The best position for it to adopt was the position of a riparian owner who had the right to have the river flow down, as it was wont to flow, and it adopted this position and said to the defendants: "Now you have all got dams up the river above me diverting water out of the river, and I demand that you take them out and let the river flow down to me in its natural state, unhindered by you." The prayer of the bill makes this perfectly evident. All it asked was that the court compel the defendants to take out their dams, and

enjoin them from diverting any of the water of the river "or impeding the flow of any of said water down to and upon your orator's said lands as said water has heretofore been wont to flow therein when not interfered with by the defendants," etc. (p. 1116, record 2036). And the decree, based on the various stipulations of settlement, followed this same theory. The decree said to the various defendants: You may use your dams between such and such dates, and then said (p. 1180 of record 2036) "that except as thus permitted the defendants are perpetually enjoined and restrained and strictly inhibited from impeding the flow of any of said water to and upon the lands of the complainant hereinbefore described as the said water has heretofore been wont to flow thereon when not interfered with by the said defendants."

The *only* right then which the complainant has under this decree is to have the water of the river flow *as it was wont to flow*—and of course it does not even have this right during the periods the defendants are allowed to put in their dams.

Therefore when the river flowing down into the narrowed channel on Section 27 bursts its banks and pours out through the "cuts" which have been more or less all along the river bank in this part of its course from time immemorial, the river *is* flowing *as it was wont to flow*. It is doing just what it has always done. And the Pacific Live Stock Company cannot complain.

The complainant would have far more cause for

proceeding against Hanley as for a contempt on account of his closing up the breaks in the banks than to proceed against him for leaving them open. It might say with some propriety: "Here, this water has always poured through those rents on Section 27 and flowed down onto our Section 34, and the decree gives us the right to have the water flow upon our lands as it has been wont to flow unimpeded by you, and we don't want you to interfere with it by closing those cuts. We want to catch it up in our Orphan Ditch and use some on our 34 and carry the rest over onto our 33, and you let it alone." The complainant would have a better right to say this than what it is saying.

THE DRAIN DITCH

It is important to remember that the decree does not limit Mr. Hanley's use of his drain ditch to any specific dates. The only limitation placed upon him is that he shall use the drain ditch only for the purpose of draining water from the surface of his land and not for the purpose of irrigation. But *whenever* the surface of Mr. Hanley's lands needs draining, he may open the head of the drain ditch and use it for these drainage purposes regardless of dates. (Decree, p. 1170 of record No. 2036, and 200 Fed. 468, 484.) The theory of the drain ditch has been already explained. It is used to take some of the water out of the river and get rid of it when the river is too full and is flooding Sections 27 and 35 too deep, or is flooding them when Mr. Hanley wants the water kept off them.

We think it is sometimes a lack of appreciation of the fact that the sole limitation on Hanley's use of this ditch is that he shall use it only for drainage purposes, that leads the Pacific Live Stock Company to rush into these contempt proceedings. The Pacific Live Stock Company sometimes gets the idea that Hanley must not use this ditch if the Live Stock Company happens to want water, and leaves out of consideration altogether the fact that Hanley's lands may be needing drainage. For example, Mr. Treadwell, during the trial of this case, said to Mr. Hanley (record, p. 242) :

“Q. So you haven't yet got any idea that we object to your taking water through that drain ditch out of the river at a time when we need it for irrigation, and at a time when we need it for watering stock? You don't know we make that objection?”

This leaves out of consideration entirely the element of whether Mr. Hanley's lands needed drainage at the time, and is illustrative of the attitude too often assumed by the complainant that its needs must be satisfied regardless of other people's.

The charge against Hanley in the complaining affidavit in regard to this drain ditch was that during the months of March and April, at a time when it was unnecessary to drain water from the surface of his land, he had the head of the drain ditch open and so diverted more than thirty second

feet of water from the river and used it for the irrigation of his land. (Record, p. 22.)

The substance of the trial court's finding in regard to this was that Hanley had used the drain ditch in violation of the decree; that he had made the flood waters, which had poured through the cuts in the bank above described and inundated his land, an excuse for opening his drain ditch to get rid of these waters, and as he was responsible for not keeping these cuts in the river bank closed, he could not, when water had flooded his land through them, make that an excuse for opening the drain ditch to carry it off, and was therefore guilty of contempt. (Record, p. 70.) The trial judge also seemed to think that the alleged diversion of water at Mr. Hanley's 21 Dam had also contributed to the flooding of his land, and, like the water coming through the cuts, had been made an excuse for opening the drain ditch.

We have before shown that Mr. Hanley was under no obligation to keep the cuts closed and if we have convinced the court of the correctness of our view, it follows as a natural consequence that if water pours through these cuts and inundates Mr. Hanley's land he has the right to use his drain ditch to lower the water in the river and so prevent the inundation. We think your Honors will further be convinced that Mr. Hanley, although he was under no obligation to do so, did everything which a reasonable man could do to keep these cuts closed. But regardless of these considerations, we

expect to show that the trial court's conclusion that the drain ditch was opened to relieve the land of a flood which Mr. Hanley had himself caused is faulty because it has left out of account a very important fact in the testimony. And that fact is that the *drain ditch was admittedly closed tight during practically all of the time that flood was taking place*. The so-called diversion of water at the 21 Dam didn't commence until the first of April (Griffin, p. 94), and the water did not go through the breaks in the river bank until some time in April; the exact date is not disclosed in the testimony, but Griffin didn't take his photographs of the breaks nor make his measurements of the amount of water going through them until the 20th of April (Griffin, p. 102); and certainly no water went out through these breaks until the flood waters began to come, which was between the fifth and the tenth of April (Ryan, p. 296). That the flood waters didn't come earlier than this is corroborated by complainant's own witness Newman, who says that during March he couldn't even get enough water for his stock (Newman, p. 172), and that the high water came "some time along the first part of April" (Newman, p. 182). It is certain then that the so-called diversion of water at the 21 Dam didn't commence until April first and that the water didn't rise in the river so as to go out through the breaks in the bank until some time in April; and yet as early as the third or fourth of April, Hanley gave Ryan orders to close the drain ditch

headgate (Ryan, p. 295), and on April 5th Ryan did close it by putting in all the stop boards (Ryan, p. 288), and two days later, noticing that the gate was leaking underneath, tamped it tight with manure and stack-bottom (Ryan, p. 288). This corresponds with Griffin's testimony that it was closed tight sometime after the eighth (Griffin, pp. 93-94), and also with Newman's testimony that it was closed on the seventh or eighth (Newman, p. 177). The so-called diversion of water at the 21 Dam continued from the first of April until the third of May (Griffin, p. 94), and the water went through the breaks in the river bank apparently through most of April, since Griffin took his photographs of it on April 20th. The headgate of the drain ditch is admitted, even by complainant, to have been closed tight about April 8th. It is apparent therefore that practically all of the water through the breaks in the river, and most of the water said to have been diverted at the 21 Dam, came out of the river *after the drain ditch is admitted by everybody to have been closed*. How, therefore, the trial court was able to find that Mr. Hanley had purposely flooded his land and had then used this flood as an excuse to open his drain ditch, is more than we can understand. The main flood occurred after the drain ditch was closed.

Moreover, the water that left the river at the 21 Dam and ran into the Hanley Upper Ditch, was only forty second feet even according to complainant's contention (Griffin, p. 94), and was probably

carried by the main branch of that ditch into the northeastern part of the Hanley property, where it could have no possible effect upon this territory served by the drain ditch. Furthermore, when we come to consider the charge as to the 21 Dam we shall show that this water was not a "diversion" at all, but was only the water that ran naturally into the head of the Hanley Upper Ditch when the 21 Dam was open, and the right to have it thus flow is expressly given to Hanley by the decree.

We have pointed out what we conceive to be the error in the trial court's opinion; an error which we attribute to a failure to appreciate the *time* when the drain ditch was closed and the *time* when the lands were flooded. But we wish to go further and say that even if the drain ditch had been used to carry off the water from the breaks and the water flowing into the Hanley Upper Ditch at the 21 Dam, Mr. Hanley would have had a perfect right to so use it; providing only he did nothing to divert water at the 21 Dam before the date the decree permitted.

Before taking up Mr. Hanley's story of the use of this drain ditch we point out that the only witnesses for the complainant on the subject are Griffin, the young engineer who was working for complainant, and Ben Newman, complainant's foreman, and desire to call attention to some features of their testimony. First, we point out that Griffin first saw water running over the headgate of the drain

ditch several days before April 3rd, and on April 3rd and on April 8th he measured it and found thirty second feet of water going through it (Griffin, pp. 93 and 94); and it is largely for this that the complainant finds fault. Yet at this very time, according to Griffin's own admission, there was water standing on 27 and 35 and the river was overflowing its banks in 35 (Griffin, pp. 115 and 116), and he didn't follow down the drain ditch because "there was too much water there" (Griffin, p. 117). This certainly shows, if anything could, that the surface of Mr. Hanley's lands was covered with water at that time, and he had a perfect right to be using the drain ditch to carry it off. Another point in regard to Mr. Griffin's testimony is this: It is perfectly well known to all who are familiar with the Hanley drain ditch that it can't be used for irrigation. Being a drain ditch it runs through the low ground, not on high ground, as irrigation ditches must in order to put the water out on the land. Moreover, it only runs about a mile before it enters the Pacific Live Stock Company's land and water going down the drain ditch is lost to Hanley. Yet Griffin was so inclined to draw conclusions in favor of his own side, that he first said this water going down the drain ditch would benefit Mr. Hanley greatly because he could use it for irrigation, and then had to admit that he hadn't followed the ditch down, didn't know where the water went to, and really knew nothing about it; his testimony being as follows (Griffin, p. 117):

“Court: Would water going down the drain ditch benefit Mr. Hanley?

A. Why, I think so, greatly yes.

Court: In what way?

A. Getting the water spread out over those sections of the country it irrigated.

Court: Does the water spread out as it comes out the drain ditch, or does it pass off?

A. It will spread out over the land.

Q. Do you mean to say the water from this drain ditch, after it gets into the drain ditch, spreads out over Mr. Hanley's land?

A. It was apparently doing so at that time.

Q. Where was the water running out from the drain ditch below the headgate at the time you speak about?

A. I didn't follow it down. There was too much water there.

Q. Do you know, as a matter of fact, that there was a solitary inch of water going out of that drain ditch over Hanley's properties at that time?

A. No, I do not.”

And this is the only testimony in the whole record to sustain the charge in the complaining affidavit (record, p. 22) that Mr. Hanley was using this water in the drain ditch for the irrigation of his land.

The other witness for the complainant on this subject of the drain ditch was its foreman, Ben

Newman. The gist of his testimony was that water was going out through the drain ditch all through March and up until the eighth of April (Newman, p. 172), and as a consequence he couldn't get enough water to water the stock which he was feeding down on Section 4, although twice in March he put boards across the headgate of the drain ditch in an attempt to force water down the river to the Orphan Headgate, where he could pick it up and carry it through the Orphan Ditch to Section 4 (Newman, pp. 172 and 173). His testimony is thoroughly unsatisfactory. It was a fact thoroughly proved by Hanley's witnesses and willingly admitted even by Mr. Griffin (Griffin, p. 114) that the headgate of the drain ditch was a well built, substantial, new structure, built only the previous Fall and made out of new lumber. Yet Newman says that it is not a good headgate; that it was good at one time, but it is now "pretty well rotted away" (Newman, p. 175).

There are two headgates at the drain ditch, one an old rotten abandoned one, which is nearest the river, and another new one placed as a substitute a little further down the ditch away from the river. The conclusion is irresistible from Newman's testimony, either that he never went to the drain ditch at all, and in giving his testimony was relying on his former knowledge of the old headgate, which he did not know had been replaced, or, if he did go up to the drain ditch, looked only at the old headgate, never saw the new one at all, and consequently from such superficial examination could not possibly

know whether any water was going down the drain ditch at all or how many boards there were in the new headgate to stop the flow of the water down the ditch. Furthermore, he is utterly unable to give any satisfactory explanation of how it was that when he put boards in the headgate, in order to force water down to his cattle in Section 4, he got no results. But as soon as Hanley's men closed the gate he got immediate results. (Newman, pp. 179-182.)

We come now to Mr. Hanley's justification of his use of the drain ditch. He says that the winter was "evenly cold" and the ice froze solid to the bottom of the river channel and blocked it, forming an ice dam, so that during March the choked, narrow channel down through Sections 27 and 35, blocked by this ice dam, was unable to carry what little water began to come down with the opening of Spring, and the water, even though there was not much of it, spread out over Sections 27 and 35, so that he really couldn't keep the water off these sections; that he was feeding cattle in Section 35 and it was necessary to keep the water off it on that account; and that as soon as Spring came and broke up the ice in the river and the channel was cleared, he issued strict orders to have the drain ditch closed, and told his men not to depend on the boards in the headgate, but to go out and haul stack-bottom and tamp it in there to be sure that it was stopped tight; and this was done. He says that in doing this he suffered the gravest injustice, because

the high water coming down the river was unable to go through the drain ditch, which he was keeping closed, and so poured out over Sections 27 and 35 and overflowed them; and that this condition on Section 27 was aggravated by the big levee of the Orphan Ditch, which the company had constructed and which backed the flood waters up on 27 to a depth of two feet and spoiled about two hundred acres of hay; and that it would have been a great benefit to him to have opened the drain ditch and let these flood waters off, but that he did not do it because he had set out on a deliberate policy of conciliation towards the Pacific Live Stock Company and he was willing to suffer almost any injury rather than give any possible ground for complaint.

The foregoing is in substance Mr. Hanley's testimony. (Hanley, pp. 194-199, 257-258.) It is not contradicted by any witness. For example, there is not a single witness who denies that the river channel was blocked with ice or that the water was standing deep on Section 27, backed up by the Orphan levee, after Mr. Hanley's drain ditch was closed tight. Indeed the latter fact is stated by Mr. Griffin himself and he even took a photograph of this water standing on Section 27 on April 20th,—twelve days after the drain ditch is admitted even by the complainant to have been closed. We ask your Honors to look at this photograph (Complainant's Ex. No. 23.) And Mr. Treadwell himself says that on the 18th of April—ten days after the

drain ditch was closed—he stood at the Orphan Headgate with Mr. Hanley and the lower end of Section 27 next to the Orphan levee was “a sea of water.” (Treadwell, p. 114.) Surely it is evident that to have opened the drain ditch would have been a great relief against this condition; and yet Mr. Hanley preferred to suffer the injury rather than arouse any friction with the Pacific Live Stock Company. The *Orphan Ditch* would not carry off this water. The photograph shows this. And, indeed, Mr. Griffin admits it (Griffin, p. 113) where he says: “Q. And you say that there were times when the ditch would not carry the water that came over 27? A. Yes.” Mr. Hanley’s conduct, therefore, as it seems to us, was the more admirable because this very flooding of Section 27, which he refrained from relieving by opening the drain ditch, was caused in large part by the Orphan levee, which the Pacific Live Stock Company had built.

We said that no one contradicted Mr. Hanley’s testimony that the winter was an unusual one and that the river channel became completely dammed with ice. Far from any contradiction, there was complete corroboration. George McLaren says that the ice was a “good deal thicker” this year than usual (McLaren, p. 280), and that as soon as the ice had gone out of the river he put enough boards in the stop gate to cause the water to rise to the top of the bank and overflow (McLaren, pp. 280 and 282). (Of course it is obvious that when he put in enough boards to cause the river to overflow the

banks there was no need to put in any more.) Ryan says that the river was "deeply froze," that he was feeding cattle there until about the 20th of March (the date when McLaren put the boards in) and there was still ice in the river then (Ryan, p. 296), and that he, on the fifth of April, put the boards in the headgate "full, clear up" (Ryan, p. 288). (This was apparently putting in the rest of the boards that McLaren had left out on the 20th because of the water overflowing the bank.) And Ryan says that he then worked two days repairing one of the breaks in the river bank, and then came back to the drain ditch (which would be about the 8th) and found an underdraft or leak through the headgate and plugged it with stack-bottom, and that he did these things pursuant to Mr. Hanley's instructions. (Ryan, p. 288.)

It is surely evident from all this testimony that Mr. Hanley was using the drain ditch most carefully, and was giving special instructions to his men to use it in a way that the Pacific Live Stock Company could not possibly find any fault with. He seems to have had this drain ditch particularly on his mind as a possible ground of complaint and was determined to avoid it. He certainly had the right to drain the water from his lands, when the ice was spreading the water over them in March and interfering with the feeding of his cattle on 35, and as soon as that condition ceased, he closed the drain ditch and kept it closed during a long period when it would have been of the greatest

benefit to him to have had it open to relieve himself of the flood.

This fact that he had the drain ditch closed during the flood period suggests another point which is worth noting, and that is that what the Pacific Live Stock Company is primarily interested in is to get the *flood waters* and, so far as the drain ditch is concerned, *it got them*. The whole compromise, which led to the entry of the original decree, was based on the theory that if the Pacific Live Stock Company could get the *flood waters* that came down in the Spring, it would let the various defendants put their dams in the river after certain specific dates in May. If the Pacific Live Stock Company could get the flood waters it was satisfied, and the defendants could take the balance. There is no question about this fact. It is illustrated in this very contempt proceeding where Mr. Treadwell, examining Mr. Gilcrest, asks (p. 156): "Q. And from your knowledge of conditions, is it possible for you to make a crop of hay on your property unless you get the water during this *flood period* in March and April?" And it is illustrated again on page 169, where Mr. Gilcrest says: "But it is a very important matter,—nothing more so—in the Spring to get that *flood water*, and I always make it a point to be there at those times, and look into it myself."

We have before shown from the testimony of Ryan and Newman that the flood did not commence

until between the *fifth and tenth of April*, and by that time the *drain ditch was sealed up tight*. It may have been with this idea in mind—namely, that the Pacific Live Stock Company's chief concern was to get the flood waters—that Mr. Hanley thought that leaving his drain ditch open in March to drain the water off his lands, could not possibly be a ground of complaint by the Pacific Live Stock Company; and it may have been with this same idea in mind that he gave his particular instructions on April third or fourth to seal the drain ditch tight, so that the Pacific Live Stock Company would get its flood waters, although to do so overflowed him as above explained. The truth is that this affair of the drain ditch, even if every syllable which the Pacific Live Stock Company says about it were true, was, like the other charges on the east fork, a trifling matter and would never have been heard of, if Mr. Treadwell had not got angry over the fancied “conspiracy” between Mr. Hanley and the men on the west fork.

An attempt was made by the complainant to show that Mr. Hanley was irrigating his Fennimore Place down in Section 3 in the adjoining township at the time his drain ditch was taking water—the inference being that if he was irrigating Section 3, it showed his land did not need drainage. As a commentary on this, it should be observed, first, that the Fennimore Place is a different body of land from that served by the drain ditch. The nearest corner of it would be more than a mile and

a half from the drain ditch. It doesn't appear whether it is high land or low. From the fact that it lies on the *west* side of the river and the country slopes *east*, we should judge it is higher ground. It is quite conceivable therefore that this land might need irrigation when the land nearer the drain ditch needed drainage. It should next be observed that Mr. Hanley does not say he was keeping the water off Section 35 because it did not need irrigation. He says he was keeping it off because he was feeding cattle there—quite a different thing. Finally it should be observed that nowhere in the testimony does it appear just *when* Mr. Griffin first saw the Fennimore Place being irrigated, but the photograph he took of it is dated April 14th—*six days after the drain ditch was closed tight*. (See Complainant's Ex. 26.)

Even if Mr. Hanley be considered to have violated the decree in the use of the Drain Ditch, the purgation of the contempt required by Judge Wolverton's decree is unwarranted and erroneous.

Judge Wolverton's decree (record, p. 78) says that Hanley may purge himself of the contempt by closing the drain ditch "*so as to prevent the same from diverting water from said river or from being used except to drain surface water from the lands described in said decree.*" The words in italics are what we object to. The requirement that Mr. Hanley must close the drain ditch "*so as to prevent the same from diverting water from said river*" is en-

tirely unwarranted by the original decree, and would forever destroy the usefulness of the Hanley Drain Ditch. The whole purpose of building the ditch was to do exactly what is now forbidden, namely, *divert* water from the river, in order that the river would not flood Sections 27 and 35 too deeply. The very fact that the head of the ditch is *in* the river shows this, and the right has always been recognized.

The other thing we object to is the use of the word "surface" in the requirement that Hanley shall not use the ditch except to drain "surface" water from his land. This is perhaps not so serious as the first objection, but is nevertheless objectionable. The original decree does not say "surface" water; it says simply "water," the exact phrasing being (p. 1170 of record No. 2036) that Hanley "shall maintain said ditch for the purpose of draining water from the surface of the land above described and not for the purpose of irrigation." Judge Wolverton, in his recent decree, has added a further restriction by interpolating the word "surface" before "water."

This may not seem very serious, but Mr. Hanley's experience with the Pacific Live Stock Company, since the original decree was entered in 1901, has made him fearful, and we do not like to see any new words interpolated in the decree. We do not know what possible new contention the Pacific Live Stock Company might base upon them.

Judge Wolverton, by the above language, has

required Hanley to close the drain ditch so that it will do neither of two things. One—divert water from the river, or, two—be used for anything except to drain *surface* water from the lands. All that Judge Wolverton had a right to do was to require Hanley to observe the terms of the original decree, to wit, use the drain ditch only for the purpose of draining water from the surface of the land.

In fairness to the trial court we must say that we think this is mere carelessness. We do not think he intended his present decree to go further than the original decree. But the present decree was prepared by complainant's attorneys, and Judge Wolverton probably signed it without noticing the defect in it.

THE 21 DAM

The 21 Dam is Hanley's big dam in the east fork up in Section 21 and is the source of the Hanley irrigation system. From it the Hanley Upper Ditch—quite a good sized canal—leads off easterly, as shown on the sketches in this brief, and the 21 Ditch, a smaller ditch, on the west side of the river, leads off down through Section 21, closely paralleling the river. As we have before pointed out, the Hanley Upper Ditch is sometimes carelessly referred to in the testimony as the 21 Ditch, from the fact that it leads off from the 21 Dam. But this is a mistake. The true 21 Ditch is the small ditch leaving the 21 Dam, and running down the *west* side of the river, while the larger ditch on the

east side of the river is properly the "Hanley Upper Ditch." This 21 Dam is quite a large structure,—in fact the whole width of the river—and the up-rights in it, against which the horizontal boards are placed when it is desired to close the dam and stop the water, divide the dam into four divisions or openings, through which the river runs when the boards are not in. The dam has a rock foundation and its bottom is slightly above the bed of the river. Complainant's Exhibit 11, a photograph of the dam, shows this quite clearly.

This is the dam against which the bill of complaint was directed. The decree allows Hanley to close this dam and thereby divert the water from the river into his two ditches leading from it, from the fifth of May to the first of July each year, and further allows him to take any water, regardless of dates, that may naturally flow into his said ditches while his dam is open so that it does not obstruct the flow of the river (p. 1170 of record No. 2036). It will be observed that Hanley thus has two rights at this dam,—one, at any time of the year, without any limitation of dates, he may take such water as flows into his ditches while his dam is open; and, two, he may close his dam and take sufficient water to irrigate his lands between May 5th and July 1st of each year.

The charge against him is that during March and April, 1915, he maintained one board part way across this dam, and permitted brush and debris to accumulate above the dam, so that it became

obstructed and raised the water about a foot above the floor of the dam, and by these means diverted into the Hanley Upper Ditch more than forty second feet of water. (Complaining affidavit, record, p. 23.) Mr. Hanley's answer is found in his affidavit, record, pp. 38 and 39. He denies that he placed or maintained a board part way across the dam or deliberately permitted brush to accumulate above the dam, but says that he is necessarily absent from this locality a great deal of the time and it is possible that for a short period one board may have been part way across the dam, and brush may have accumulated above it; but if so, this was without any design and without his knowledge and had no material effect on the flow of water; and that all such accidental obstructions, which to a slight and temporary extent occur every year, were removed by his orders as soon as perceived; and he denies that the water was raised one foot above the floor of the dam, or that forty second feet of water, or any substantial quantity, was diverted into the ditch.

Complainant's Exhibit 10 is a kodak picture, taken on April 8th, of this 21 Dam showing the brush in it.

The testimony in regard to this matter of the 21 Dam is fairly clear. Mr. Griffin says that this dam was diverting close to forty second feet of water from the river from the first of April to the third of May. (Griffin, p. 94.) That there was one board across one of the openings of the dam and

some willow brush was against the other openings, and that in consequence the water was raised in the river about a foot. That some of the brush was old and had evidently floated down the river; other pieces of it had the appearance of being cut, as with a hatchet or ax. (Griffin, p. 95.) That the dam remained in this condition with these obstructions in it from the first part of April until the twenty-fifth or twenty-sixth of that month. (Griffin, p. 96.) And on cross-examination he says that he was at the dam "around the 24th" of April and saw that the obstructions had been removed. (Griffin, p. 128.) He further says on cross-examination that the one board in the dam was a two-by-six (Griffin, p. 124) and was about four feet long, and that there are four openings in the dam, each about four feet in width. (Griffin, p. 125.) Asked whether the brush had the appearance of being deliberately laid in the dam, he said: "Well, they were not laid in there symmetrically no," and also admitted that he didn't see along the banks of the river anywhere in the vicinity of the dam any place where willows had been cut. (Griffin, p. 128.) He said further that the 21 Ditch leading out on the west side of the river from the dam had its headgate closed, and if that headgate had been open and the brush and board and all obstructions removed from the 21 Dam, the water would have run naturally from the river into that ditch (Griffin, p. 130); and that the board in the dam was in the slack water on the opposite side from where the current was (Griffin,

p. 138), and consequently where it would make the least obstruction.

Mr. Gilcrest says that he saw the dam with these obstructions in it on the 25th of April (Gilcrest, p. 161), which corresponds fairly closely with Mr. Griffin's testimony that the dam remained obstructed until the 25th or 26th of April. (Griffin, p. 96.)

The testimony of these two men is that on which the complainant relies.

Mr. Hanley testifies that he was at the 21 Dam "last Fall" (1914) and wasn't there again until Spring (Hanley, p. 205), when he and Judge Webster visited the dam together and Judge Webster said to him that the Pacific Live Stock Company was complaining about some brush and a board being in the dam, and Hanley went and looked and didn't see any board, but that there were some little willows floating on top of the water against the dam; that the permanent structure of the dam is probably two feet higher than the level of the river, and consequently as the water flows through the dam it "breaks away with the current" (i. e., the water was lower where it ran through the lower end of the dam than it was at the upper end of the dam where the willows were floating). That the willows were not diverting any water and could not be called an obstruction, but nevertheless he gave orders to have them taken out, and he thinks this was about the 20th of April. (Hanley, p. 206.)

Asked whether the board and brush diverted forty second feet of water, as charged in the complaining affidavit, he said no they did not divert any water, and that if he had been strict about getting all the water from the 21 Dam which the decree entitled him to, he would have opened the head of his 21 Ditch (on the west side of the river) and water would have been running into it all Spring; that he had not taken out as much water at the 21 Dam as would naturally run into his ditches there with the dam entirely open, because he hadn't been "technical to the use of the water in all those little details" to try to get all that his strict rights entitled him to. (Hanley, pp. 206-207.)

George McLaren testified that some time toward the last of April he took this brush out of the 21 Dam (McLaren, pp. 277-278) and he found a few willows and some small twigs, little small stuff that had lodged in the high water; that there were two or three willows there that were six or seven feet long; that they were not obstructing the water at all when he was there, but were out of the water (it will be remembered that the highest flood occurred during the earlier part of April and consequently the water had fallen somewhat at this time). That he got hold of one of these willows and pulled it loose and this freed the others and they all floated away (McLaren, p. 278); that when he pulled the willow loose he pulled a board up at the same time, and he does not know whether it

was one of the regular boards of the dam or not. (McLaren, p. 279.)

These are all the witnesses on this subject.

Now there is one thing that certainly is apparent from this testimony, and that is that whatever brush or board got across the 21 Dam got there without any intention of Mr. Hanley and without even his knowledge. You have got to believe him when he says he never heard about it until he and Judge Webster were at the dam on April 20th. And the trial court should not have held him in willful contempt. If there had been any willful intent on Mr. Hanley's part to obstruct the flow of the water through this dam, do your Honors suppose that he would have selected one little board six inches high and four feet long to place in a dam at least sixteen feet wide? And do your Honors suppose that he would have placed it in the slack water? And would the willows have been so carelessly lodged that even Griffin says it didn't look as if they had been symmetrically laid in there, and when McLaren pulled one of them loose they all floated away? Moreover, if there had been any intent on Hanley's part to get all the water he could at this dam, would he have allowed the head of his 21 Ditch to remain closed during the whole time, when even Griffin admits that if it had been opened water would have run into it, even if there hadn't been any board or willows in the dam at all? The complaining affidavit charges Hanley with "placing" the board in

the dam, but merely with "permitting" the brush to accumulate.

The Silvies River is lined thickly with willows throughout its whole course above this dam and there are ranches all along the upper river from which these willows at the dam could have floated down. It is even in evidence that the Pacific Live Stock Company itself was surveying and doing engineering work along the upper river, and the willows with the hatchet marks on them may have even drifted down from this very work. Anyway it is plain enough that these willows simply drifted down the stream, caught in the dam and Hanley had them taken out as soon as he knew about them. Certainly this is not a thing for which to hold a man guilty of willful contempt.

Next: Did these "obstructions," such as they were, divert any water at all from the river. Mr. Griffin says they did. Mr. Hanley says they did not. That Mr. Hanley is right is shown, as clear as day, by one of Mr. Griffin's own admissions; and that admission is *that the same amount of water continued to flow into the head of the Upper Hanley Ditch after the "obstructions" were removed, as flowed into it when they were in the dam.* Mr. Griffin says that the obstructions were removed about the 25th or 26th of April. (Griffin, p. 96.) In another part of his testimony he says they were removed "around the 24th." (Griffin, p. 128.) But give him the benefit of the discrepancy and say it was the 26th. This then was when the obstructions were removed.

But the Hanley Upper Ditch continued to take forty second feet of water up till the third of May, according to Griffin's own statement. (Griffin, p. 94.) So that the same amount of water ran into the ditch when the obstructions were taken out as when they were in, and it is consequently demonstrated to a mathematical certainty that they exercised no influence whatever on the flow of the river through the dam and did not divert any water at all.

The fact is pretty clear that Mr. Griffin was fooled, by the drop of the water flowing through the dam and the sight of the willows lodged above, into thinking that, because the water stood lower on the bottom of the dam at its down-stream end than at its up-stream end, the willows were raising the water. As Mr. Hanley has pointed out in his testimony, and as is apparent from a glance at the kodak picture of the dam which complainant introduced in evidence (Complainant's Exhibit No. 11), the bottom of the dam with its rock foundation is higher than the bed of the river. Consequently, as the water enters the dam on the up-stream side it is held up a little, and then as it flows past the up-rights in the middle of the dam, it breaks sharply into a swifter current, due to the free outlet afforded by the lower end of the dam, and consequently is lower in level where it rushes off the lower end of the dam, than it is where it is held up a little at the upper end of the dam. When Mr. Griffin saw the board and the brush lodged against the up-rights of the dam and saw that the water above the brush

was higher than it was below it, he concluded that it was the brush and board that were raising the water; but he was deceived by the action of the water which we have described as it runs through the dam, and the willows were simply floating on top of the water against the uprights and were not an obstruction. The one board (only six inches by four feet remember) was in the slack water and certainly had very little, if any, effect.

That we are right in this must be so since, as we have shown, the Hanley Upper Ditch was taking as much water after the obstructions were out as when they were in.

THE CHARGE IN REGARD TO THE PEOPLE'S DITCH

This charge related to the People's Ditch on the west fork of the river and is contained in paragraph VI of the complaining affidavit. (Record, p. 25.) It was not sustained by the evidence, and the trial court absolved Hanley from it. Consequently we have not assigned it as error and need not discuss it.

THE PROOF MUST BE BEYOND A REASONABLE DOUBT

In closing this brief we wish to call the court's attention to the fact that even cases of civil contempt, as distinguished from cases of criminal contempt, partake of the nature of a criminal proceeding. They are *quasi*-criminal, and it is within the power of the court to punish the defendant by fine and imprisonment. The proceedings being *quasi*-

criminal, the rule of criminal law obtains—that the proof must be beyond a reasonable doubt.

The following are cases of civil contempts, wherein the authorities have laid down this rule:

In *California Artificial Stone Paving Co. vs. Molitor*, 5 Sup. Ct. Rep. 618, Mr. Justice Bradley said, at the close of his opinion, page 622:

“Process of contempt is a severe remedy, and should not be resorted to where there is fair ground of doubt as to the wrongfulness of the defendant’s conduct.”

In the case of *Accumulator Company vs. Consolidated Electric Storage Company*, 53 Fed. 793, the court said, at the close of his opinion, page 796:

“This proceeding is criminal in its nature and character and the same rule should govern as in the trial of indictments. The burden of proof establishing violation of the injunction is upon the complainant, and the defendants are entitled to the benefit of any reasonable doubt.”

In *Birdsell vs. Hagerstown Agricultural Implement Mfg. Co.*, Federal case No. 1436 (an infringement of patent case), the court said, 3 Fed. Cases, page 450, first column:

“Now, it is a rule governing courts of equity in such cases that they will never attach a defendant for contempt where the violation of

the injunction is not plain, and proved to the satisfaction of the court."

In *State ex rel vs. Small*, 49 Ore. 595, the court said, at the close of the opinion, page 603 :

"In contempt proceedings for an alleged violation of an order or of the process of a court, the proof of the guilt of the person charged with the offense, should be clear and conclusive before he is punished therefor."

The same rule is laid down in *General Electric Company vs. McLaren*, 140 Fed. 876, 878 (an infringement of patent case).

In 9 Cyc, page 45, it is said :

"A clear case of contempt of court must be established by the evidence. Proceedings in contempt being in their nature criminal in character, the strict rule of construction applicable to a criminal prosecution obtains therein, and presumptions and intendments will not be indulged to sustain a conviction. The guilt must be established by clear and satisfactory evidence; a mere preponderance is not enough. The accusations must be supported by evidence sufficient to convince the mind of the trior beyond a reasonable doubt of the actual guilt of the accused."

In this case certainly the proof has not come up to the requirements of this rule. Not one of the charges of the complaining affidavit have been

proved by even a preponderance of the evidence, to say nothing of evidence beyond a reasonable doubt.

And in our opinion the matters on the east fork are all so trivial, even if all that the complaining affidavit says about them were true, that they never would have been made the basis for a contempt proceeding had the troubles not arisen on the west fork. As to all of these troubles, east and west fork alike, Mr. Hanley cannot get it out of his mind that when the Pacific Live Stock Company wrote to H. I. Corbett April 5, 1915, and asked Mr. Corbett to treat Mr. Hanley as his hired man and direct him to cease his supposedly hostile attitude toward the Pacific Live Stock Company in regard to that company's land suits, and when Mr. Corbett refused to adopt any such tone toward Mr. Hanley (Defendant's Exhibits "A" and "B," Record, pp. 314-319), and when Mr. Treadwell asked Mr. Hanley for his help in these same land matters and Mr. Hanley refused (record, pp. 210-211)—it is Mr. Hanley's conviction that after these matters and in consequence thereof, this contempt proceeding was brought to punish him for his attitude.

Respectfully submitted,

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